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The West Virginia Gubernatorial Election Contest 1888-1890

PART II

FOUR GOVERNORS

By James Henry Jacobs

"Four wise men" claimed the state executive office when only one of them, whoever he might be, was legally "staked" to the office. The claimants were E. Willis Wilson, A. B. Fleming, Nathan Goff, and Robert S. Carr.

The occurrences of March 4, 1889, were not "chance happenings." They were assertive. yet methodically planned for the peace and quiet of the state.[328] West Virginians, with an eager but quiet tenseness, awaited inauguration day. There was no established legal precedent to determine who should become governor at the expiration of Wilson's term. It was plainly a case requiring new judgment and fitted to become precedent in itself. Toward the end of February, Wilson invited Goff, Cowden, and Walker to discuss inauguration day.[329] Wilson "regarded it . . . his duty to hold the office in trust . . . until the contest was decided" and Goff "was determined to have his rights." It was agreed that both parties would abide by the decision of the Supreme Court.[330]

In several more days Carr was reported as preparing to become governor *ex officio*.[331] As president of the senate, he was permitted by the constitution to hold the

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[328] *The Preston County Journal*, February 28, 1889.
[329] *Ibid.*
[330] *Ibid.*
[331] *Ibid.; The Sentinel*, February 16, 1889.

governorship under specified conditions when a seated or a new candidate failed to qualify for the office.[332]

Fleming was the fourth contender "to the throne." On March 4, he remained firmly attached to the background where he preferred to trust to the devices of the Contest Committee in pursuing his proposed election against the *prima facie* election of Goff.

When the assembly purposely avoided the gubernatorial issue, it appeared before the session's end that the Committee had not been able to unravel the contested votes within the two weeks following adjournment and preceding inauguration day.[333] More depositions of illegal votes could be taken until March 10,[334] the end of the forty days allowed for such action after the serving of the counter contest notice upon the original contestant.[335] Feeling that enough evidence could not be properly gathered within that time to justify the contestants' positions the legislators extended the time limit for taking depositions until May 10.[336]

Events of March 4 read like a "blood and thunder" story of gold-rush days. Excepting for a few strangers in Charleston and also for the small groups which congregated on the streets late in the morning to discuss the pending inaugural drama, there was little else to denote that Wilson's exalted position would be shortly challenged.[337] A rumor was heard by the Democrats in the capitol that Goff had an armed force, three or four hundred men who were ready to accompany him. Democrats were determined that Goff would not take the oath of office. Armed men were dispatched throughout the building, sixteen of whom were hidden directly in the governor's office vaults. Before entering the building "Goff counselled moderation on the part of his followers." Armed Demo-

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[332] *Constitution of 1872*, Art. VII, Sec. 16.
[333] *The Preston County Journal*, January 31, 1889; *The Sentinel*, February 9, 1889.
[334] *House Journal*, 1889, p. 308.
[335] *Code of 1887*, Chap. VI, Sec. 13.
[336] *House Journal*, 1389, pp. 396-397.
[337] *The Preston County Journal*, March 7, 1889; *The Wheeling Intelligencer*, March 5, 1889.

crats prevented many of the Goff followers from entering the building.[338] It appeared that Goff might take oath under duress.

Goff, Cowden, Captain Henry C. McWhorter, and some spectators entered the governor's reception hall. There the *prima facie* governor-elect accepted Wilson's courteous invitation to his office for a few moments. At high noon Goff mounted a chair in the crowded reception room and in an inaugural speech of defensive oratory flailed the means brought to prevent him from being declared governor.[339]

He declared the Democratic venture a "pre-arranged plan" by a legislative caucus and that "the Speaker of the house of delegates [*sic*], in obedience to his party, failed to perform his constitutional duty of 'opening and publishing the returns,' and declaring the person . . . elected who had received the highest number of votes for . . . Governor." Goff was administered the oath of office by McWhorter, and then with Cowden he marched into Wilson's office and there demanded possession of the property, and insignia of the gubernatorial office. As pre-ordained, Wilson refused, saying that since no declaration of office was made by the joint assembly "he believed it his duty to hold office" until a declaration would be made. Goff replied that the legislature's failure to declare who was elected did in no wise affect the election. He told that certified returns from every county in his possession proved his election by a plurality. In his suave and dignified manner he thanked Wilson for promising assistance to secure an early settlement in court.[340]

A few minutes later Carr went to the governor's office and A. D. MacCorkle administered to him the oath of office, whereupon he formally demanded Wilson's office. He quoted Article VII, Section 16 of the Constitution as

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[338] MacCorkle, *op. cit.*, 437.
[339] *The Preston County Journal*, March 7, 1889; *The Wheeling Intelligencer*, March 5, 1889.
[340] *The Preston County Journal*, March 7, 1889; *The Wheeling Intelligencer*, March 5, 1889.

his authority to office, applying the clause "failure to qualify" to Wilson, because his four year term by election ended on March 4. Wilson repeated the reasons he had given Goff for continuing in office.[341]

Goff's and Carr's inauguration brought two questions before the West Virginia Supreme Court of Appeals for settlement: Was Goff entitled to discharge gubernatorial duties? And if not, who should act as governor?

Goff petitioned the Court for a *mandamus* writ to require Wilson to show why he should not surrender his office.[342] The plaintiff's attorneys stated that the legislature's failure to declare Goff elected was non-effectual upon his right to office, and that Wilson's legitimate term ended March 4, 1889.[343]

Agreement was reached between the plaintiff and the respondent that the case should be decided purely upon the petition and Wilson's demurrer and motion to quash the petition.[344] At the outset the Court conceded that Goff's title, if proved, could demand a *mandamus* writ.[345]

According to the Court's reviewal of the case, the joint assembly had to consider seriously whether it was duty-bound to declare a person governor before the contest was decided.[346] A declaration might have resulted in a non-elected person's heading the executive office, but the contest decision was needed to determine the fact that election before the declaration could be made. A person had no legal right to office, the Court believed, before the determination of the fact of election.[347]

It was decided that the case of Goff *v.* Wilson did not warrant adjudging the assembly's actions though it was written, favorably to Goff, that the law providing a declaration of a governor, based on the *prima facie* title to

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[341] *The Preston County Journal*, March 7, 1889; *The Wheeling Intelligencer*, March 5, 1889.
[342] 32 *W. Va.*, pp. 394-395.
[343] *Ibid.*, p. 394.
[344] *Ibid.*, p. 395.
[345] *Ibid.*, p. 396.
[346] *Ibid.*, p. 398.
[347] *Ibid.*, p. 399.

office, might have been intended to precede the contest.[348] On the other hand, President Adam C. Snyder said the constitution's framers contemplated that the legislature would provide for the settling of a contest before March 4, and that it was scarcely feasible that they or the adopters ever contemplated a non-designated person's discharging the gubernatorial duties. "The . . . guarded provisions of the constitution . . . [and] its general policy forbid any such construction, unless there be no escape from it,"[349] continued the justice.

The defective statute, wherein it failed to provide for a determination of a contest before the end of the incumbent's term, had only increased the joint assembly's dilemma. Joint assembly action allowing the election returns and certificates to be sifted by a contest committee without immediately naming an apparently elected governor was deemed, in the Court's decision, as not "unreasonable or unjust under the peculiar and embarrassing circumstances of the situation . . . ."[350]

In this case the Court had to seek chiefly whether the assembly possessed "the constitutional right" to determine the election question. Furthermore, it had to decide whether the assembly had legal and inherent possession of discretion, when it chose the manner and the time for determining the question. Here, the Court wrote that *mandamus* could be invoked "to compel the decision of a discretionary question," but it could not be used to dictate, control, review, or correct the decision. It reasoned that the house speaker and the joint assembly were quasi-judicial, because they were looked upon as possessing discretionary power to determine false and contested certificates and to declare a person elected. Snyder said, "it is hardly possible to conceive of a public office, the duties of which do not require of the officer filling it the exercise of discretion."[351]

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[348] *Ibid.*, pp. 399-400.
[349] *Ibid.*, p. 400.
[350] *Ibid.*
[351] *Ibid.*, p. 401.

Since county election commissioners, acting as counting boards, used discretion to determine the genuineness of election certificates, Snyder held that it was equally reasonable and proper that the joint assembly should also determine the legality of certificates which determination "involves the exercise of a discretion . . . ," not controllable or reviewable by *mandamus*.[352] The Court was powerless to issue the mandatory writ because the assembly had not failed to use its discretionary power.[353]

Goff had appended to his petition the *House Journal* containing the joint assembly's proceedings. From it Snyder easily deduced that the few county election certificates for governor considered by the assembly were insufficient proof of Goff's claim of 78,714 votes.[354] The Court cited that it was not privileged to exercise the power of another department of government, that is to exercise the power to name or declare a new governor, when the power was expressly conferred upon the legislature.[355] With this opinion it held that "declaration . . . [was] the only constitutional evidence of . . . [a candidate's] title to . . . office.'[356] These matters were decided by the constitution's framers and by the people when they adopted the constitution.[357] These opinions were responses to Goff's counsel, who had argued that their client was the holder of the highest number of votes, that a declaration of election was not necessary to qualify him as governor, and that the judiciary had power "by absolute necessity" for the people's rights to decree the next governor.[358]

On March 13, the day following Goff's failure to win his round in Court, Carr prayed for a *mandamus* writ, this one to compel Wilson to surrender his office to him.[359] Carr used Section 1 of the constitutional Article VII, "in

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[352] *Ibid.*, p. 402.
[353] *Ibid.*, p. 404.
[354] *Ibid.*
[355] *Ibid.*, pp. 393, 404, 405; *Constitution of 1872*, Art. IV, Sec. 11, Art. V, Sec. 1, Art. VII, Sec. 3; *Code of 1887*, Chap. III, Sec. 23.
[356] 32 *W. Va.*, p. 406.
[357] *Ibid.*, p. 405.
[358] *Ibid.*
[359] *Ibid.*, pp. 419-420.

case of the death, conviction on impeachment, failure to qualify, resignation, or other disability of the Governor, the President of the Senate shall act as Governor until the vacancy is filled or the disability removed . . . ."[360] He argued that Wilson's term had ended and claimed that since Goff had failed to qualify for office, as laid down by the court in Goff *v.* Wilson, he himself, was *ex officio* governor.[361]

Wilson's authority was the clause which related that, "All officers elected or appointed under the constitution may, unless in cases herein otherwise provided for, be removed from office for official misconduct, incompetence, neglect of duty or gross immorality, in such manner as may be prescribed by general laws, and unless so removed they shall continue to discharge the duties of their respective offices until their successors are elected and qualified."[362] Generally, Wilson's filed return was echoed in the Court's decision. He portrayed his stand relating to the proposed vacant office, Carr's right to act as governor, and the idea that the elected candidate for office was known.[363]

The Court looked upon the constitutional clause quoted by Wilson as a general rule and considered that it applied to the governorship unless deviated therefrom by an exception which would have to be strictly and concisely construed. Carr's authority was dubbed an exception which did, wherein it applied, remove the governor from under the general rule.[364] Brannon rationalized that an exception had not arisen within the true meaning of the term "failure to qualify," and "other disability" to allow Carr to be *ex officio* governor, and that they could only apply if Goff had been declared governor and then failed to "qualify."[365]

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[360] *Ibid.*, pp. 420, 423; *Constitution of 1872*, Art. VII, Sec. 16.
[361] 32 *W. Va.*, pp. 420-421.
[362] *Ibid.*, p. 423; *Constitution of 1872*, Art. IV, Sec. 6.
[363] 32 *W. Va.*, p. 421.
[364] *Ibid.*, pp. 424-425.
[365] *Ibid.*, p. 425.

The justice regarded the law stating the governor must be declared elected, and all other constitutional requirements as mandatory and indispensable.[366] Using the case of People *v.* North, of the New York Court of Appeals, he determined that the declaration and certification of an officer were necessary to complete his election, and (quoting People *v.* Crissey, in the same court) that where the necessary declaration of an officer had not taken place as a qualifying factor the old incumbent "held over."[367] The prerequisite declaration of governor dashed Carr's hopes to fragments because, the Court ruled, a predecessor must have been declared elected before he could legally fail to qualify.[368]

Without a declared governor there existed a vacancy or "disability of the governor," argued the plaintiff's counsel. The clause used by Carr, here reiterated in abridged form, read, "In case of the death, . . . failure to qualify, . . . or other disability of the Governor, the President of the Senate shall act as Governor . . . ." The Court clearly imposed its opinion in certain terms that Carr misinterpreted the usage of the word "governor." The term was attached to one who could properly act as governor and Carr would have to fill an incumbent's place.[369] The weak spot in Carr's argument was again that he would have to displace a predecessor who would have to be sitting in order to have a disability attached to him, but he himself had said that after March 4 the governorship was vacant.

A governor suffering a disability, wrote Brannon, was not a person who was incompetent in the light of the "votes of the people and the authority selected to declare his election," but rather it was some disabling feature attached directly to him.[370] Before the disability clause could apply to Carr to make him governor, the people and the legislature, it was said, must have first done all constitutionally

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[366] *Ibid.*, p. 426.
[367] *Ibid.*
[368] *Ibid.*, p. 427.
[369] *Ibid.*, p. 428.
[370] *Ibid.*, p. 429.

required of them.[371] A non-declaration was not, therefore, a disability as meant by the constitution. Brannon believed death, failure to qualify, etc., enumerated in the law used as Carr's authority would produce a vacancy.[372]

Wilson's authoritative source was respected as binding his continuance in office because, according to the Court, the clause relating to the president of the senate, provided for a different class of cases "where the election is complete, but [where] there is a vacancy caused by death or other fact, or a disability preventing his action."[373]

In order that he might be said to have a predecessor's place to fill, Carr contended that either Goff or Fleming was bound to have been elected in November, 1888. This opinion the Court considered was untenable, because it could not be legally proved and furthermore a tie might have been the result.[374] Carr's case, for the purpose of deriving any benefit from the election, was a failure. Especial mention was made by the Court that Carr did not come within the exception to the general rule relating to the governor's "holding over." Under the general rule, Wilson was entitled to keep his seat until deposed by a qualified governor.[375]

The case of Goff *v.* Wilson decided Goff was not entitled to office, but that of Carr *v.* Wilson bore two answers. It invalidated Carr's title to office, and consequently safeguarded Wilson's.[376]

Considering the constitutional provision disallowing a governor to succeed himself immediately upon the completion of his term,[377] Henry Brannon declared Wilson entitled to a prolonged term.[378] His eligibility and qualifications for the previous four-year term, it was ruled, "tested" his competency and permitted him to "hold

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[371] *Ibid.*, p. 428.
[372] *Ibid.*, p. 429.
[373] *Ibid.*
[374] *Ibid.*, p. 430.
[375] *Ibid.*, pp. 430-431.
[376] *Ibid.*, p. 431.
[377] *Constitution of 1872*, Art. VII, Sec. 4.
[378] 32 *W. Va.*, p. 431.

over."[379] The precedent here established allows a governor to continue in office "in cases where the president of the senate [*sic*] can not act as governor . . . ."[380]

It is of more than passing interest to note that Justice Brannon spoke of Wilson continuing his *old term,* wording which might reflect a paradox in his mind. To be consistent why had he not spoken of Wilson's term, in this case, as a mere continuation of his official duties? No doubt this was his intent. *Old term* would seem to suggest that Brannon presumed Wilson's continued duties marked a new term, an implication which would probably have been disliked by the justice because it smacked of the unconstitutional. He may have been momentarily adrift from his mooring of cautious phraseology.

In the interim of the legislature's adjournment and these occurrences, *supra,* the Contest Committee made small progress in gathering evidence to be used by the assembly in deciding upon the person properly elected governor. And until his successor was qualified Wilson's position as governor *ex officio* was confirmed.

THE CONTEST COMMITTEE

Working from the political pivot of the state, the capitol, the Joint Contest Committee labored at length and with diligence. Under state laws the Committee was composed of two sections: a minority of two senators, who, in this case, were the Republicans Edwin Maxwell and Presley W. Morris; and a majority of three delegates, who were the Democrats Joseph Sprigg, William E. Lively, and Chairman, William L. Kee.[381]

After it had convened several times in Charleston, from

[379] *Ibid.*, pp. 431-432.
[380] *Ibid.*, p. 420.
[381] *Report of the Minority of the Contest Committee,* p. 392. This, and the *Report of the Majority of the Contest Committee,* and the Deposit one of Mercer and McDowell Counties, are found in the *House Journal,* 1890, in the *Joint Session* section which also contains the legislature's minutes of the election contest. Each of the first three hereafter respectively referred to as *Minority Report, Majority Report,* and *Depositions.*

April 25 until May 8, for the primary purpose of hearing testimony, the Committee sought and culled legal evidence by visiting various parts of the state. It completed its hearings in mid-September. From then onward the time was consumed with the gigantic duty of compiling the results of its labors into a readable report.[382] Governor Wilson was informed of its completion on December 18, 1889, and on that date issued a proclamation to convene the legislature in extra session. The call had as its foremost point the completion of the contest.[383]

The Committee's objective was not to determine whether Fleming or Goff was elected, but rather to examine the evidence of the case, the county returns delivered to the speaker of the house, and, as a whole Committee, to decide specific voting cases. Only in the latter respect might the final result be influenced, but the objective to avoid settling the question was furthered by the joint assembly's judicial power to consider the entire case as it wished, and to pass opinion as it viewed it. The arguments and the evidence mentioned in the Committee's reports might be more readily termed *factors* in settling the contest.

Each contestant's motion to quash certain evidence of his opponent attracted the preliminary attention of the Committee. The causes of the motions varied, and the decisions might be cited as an index to the nature of the Committee, which felt a necessity to protect the *bona fide* voter.

Counsel for Goff, the contestee, failed to suppress, as wished, all Fleming's depositions taken after March 21, 1889, and to quash all his notices. This counsel stated that if Fleming's allegations were true they would not change the election to his favor nor render impossible the election's determination. Counsel for the contestant motioned to have Goff's notices quashed but made no mention of depositions.[384]

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[382] *Appletons'*, 1889, New Series, Vol. XIV, p. 825.
[383] *House Journal*, 1890, pp. 3, 10.
[384] *Majority Report*, pp. 3-4.

The *Code* provided that after the serving of Goff's counter notice forty days would be allowed for the parties to take depositions. The deadline was thus set for March 10. It was further provided that "in other respects . . . [than those provided] so far as . . . applicable" the statute relating to contested legislative seats would apply in a gubernatorial case. A point involved arose from the clause of that statute which, if new facts were discovered, permitted additional notices to be served without limitation to an adversary.

Without taking cognizance of the amount of evidence to be gathered, which was the legislature's reason for extending the time for taking depositions until May 10, Goff's counsel argued that the time for taking depositions expired on March 10. This stand was an affront to the joint assembly, and the question to be settled was whether that body had authority for its act.[385]

In its reasoning, based on authorities, the majority held that when the time or form of a statute did not appear essential to the judicial mind it could be regarded as directory rather than mandatory and that the proceedings, consequently, were valid. The joint assembly was considered a judicial body when determined by law to settle gubernatorial contests. The majority further held that the statute's command, when not strictly obeyed as to time and form, was not the essence of the thing required to be done. The legislature's time extension "as justice and fairness would require," and in which liberality even the contestee clothed himself, was described to be "a discretionary power."[386]

Denying that the time statute could be repealed, the minority reported that Fleming's counter notice and a supplemental notice of Goff "did not appear to be in time" after March 10. These had been served under a regulation of the statute applying to contested legislative seats by which additional notices were permitted any time after

[385] *Ibid.*, p. 4; *Minority Report*, p. 396.
[386] *Majority Report*, pp. 4-5.

the discovery of new facts. The members, nevertheless, examined the notices which they termed "defective," and also examined all the depositions which they believed could not be considered by the legislature because they were not finished on or before March 10. They opposed the unlimited time provision by citing a West Virginia case where the court decided that additional notices must be given and depositions completely taken not more than forty days after the original return notice was delivered.[387]

The contestant's specifications against Goff relating to the vote cast in Bowyer's precinct, Putnam County, was quashed and a governing principle formulated. Here the election officials had changed the place of voting established by law. The majority did not consider this change of sufficient import to reject the votes cast due to "the absence of fraud or irregularity" and because the voters were not deceived nor "defeated of their right to vote" nor the election in the "precinct changed or affected thereby."[388]

This rule, in turn, was applied to and quashed Goff's specifications against Fleming relating to Austin precinct, Lewis County,[389] Gilbert precinct, Logan County,[390] the voting place of Dillion Church precinct, Mercer County,[391] the voting place of Sandyville, Jackson County, and the voting place of Curtis, Roane County.[392]

Because Goff had stated only the number of votes cast for Fleming in his specification relating to Austin precinct, Lewis County, a rule was declared necessary that whenever the validity of a poll is attacked the full extent must be shown to which the result of the election is affected.[393] It was also used against Goff's specification touching Bluefield and Dillion Church precincts in Mercer County,[394] and the voting place at Sandyville, Jackson

[387] *Minorty' Report*, pp. 396-397.
[388] *Majority Report*, p. 6.
[389] *Ibid.*, p. 7.
[390] *Ibid.*, p. 8.
[391] *Ibid.*, p. 9.
[392] *Ibid.*, p. 11.
[393] *Ibid.*, p. 7.
[394] *Ibid.*, p. 9.

County.[395] Certainly if a precinct were declared illegal for one rival, it would be illegal for the other.[396] The total votes of each would have to be fairly affected.

The majority agreed with the opinion of Fleming's counsel to quash Goff's specification referring to the Laural voting precinct in Logan County, where it was alleged that the commissioners were not sworn and that the votes, consequently, should be rejected. Fleming's counsel based its opinion on the statute requiring election officials' oaths to appear on the poll books before any votes could be counted unless where it did not appear the court commissioners could be satisfied that it was taken before an official embarked upon his duties.[397] This was considered "an unreasonable regulation," unconstitutional, and not authorized under Section 11, Article IV which reads:

> The legislature shall prescribe the manner of conducting and making returns of elections, and of determining contested elections; and shall pass such laws as may be necessary and proper to prevent intimidation, disorder or violence at the polls, and corruption or fraud in voting, counting the vote, ascertaining or declaring the result, or fraud in any manner upon the ballot.

Resting on the idea that all provisions of the statute, where not prohibitory, are merely directory, the majority believed, when no harm resulted or fraud charged, that no votes were voided nor voters disfranchised because of negligent officers.[398]

After dealing at length with the Laural precinct, the majority accepted similar complaints of the contestant relating to Rock House precinct, Logan County, and the voting place of Missouri, Wayne County, and permitted their polls to be counted.[399]

Fleming's supplemental specification relating to Fields' Creek precinct, Kanawha County, where a commissioner

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[395] *Ibid.*, p. 11.
[396] *Ibid.*, p. 9.
[397] *Code of 1887*, Chap. III, Sec. 8.
[398] *Majority Report*, pp. 7-8; *Constitution of 1872*, Art. IV, Sec. 11.
[399] *Ibid.*, pp. 8-9.

allegedly had remained unsworn before receiving his trust, was quashed because the case was known before Fleming's original notice was prepared. The committee reaffirmed the rule that in West Virginia *new facts* learned *after* the service of the original notice, if not discovered with diligence, were to be in the additional notice.[400] This rule aimed to prevent a party in a contested election from holding "back any substantial part of his contention either by defective pleading or failure to exercise diligence in discovering the grounds of the contest or of defense to same, until the time for taking evidence had substantially ended."[401]

Because of the absence of any allegation that Goff's second contest notice to Fleming contained *new facts* the majority held that the notice was defective and that it "should be quashed." His third notice attempted to amend the second, an amending act which the majority members thought was without authority through any West Virginia court or statute.[402]

Bluefield precinct, Mercer County, attracted momentary attention through Goff's specification that the prescribed publication of the establishment of a voting place there was unheeded. From the appearances of the complaint the majority reasoned that courts would not set aside an election unless it was clearly illegal. Since, in this case, no illegal voting had been ascertained, and since the count had been properly conducted, it was believed there was inference enough that the precinct had been properly established and that the election notice had been properly published.[403]

Against Fleming's quash motion Goff failed to maintain his specifications wherein was questioned the vote of the whole county of Greenbrier. No record had been made of the proceedings of the commissioners of the county court when they computed the poll and forwarded the certificate

[400] *Ibid.*, pp. 6-7.
[401] *Ibid.*, p. 10.
[402] *Ibid.*
[403] *Ibid.*, pp. 8-9.

of election to the secretary of state. Records were not required, maintained the majority, the only necessary record being the election certificate, unless a recount of ballots were had.[404]

The minority members of the Committee made an effort to gratify the more optimistic citizens of the state and possibly to allay the pessimistic feeling that persisted that the election was influenced by systematic fraud. They exonerated the political parties and reported that there was a "total absence of either systematic fraud on the part of the voters, or any corruption of voters, by any candidate, politician, or any one else, either before, or at, the election. Both the contestant and the contestee and all their friends and adherents must be praised, and deserve praise for their pure and clean methods in election matters." It was further declared that if fraud were rampant it would have been "disclosed in the voluminous proof" in the case.[405]

One tends to sense, perhaps falsely, an effort in the reasoning of the minority, in its report, to eulogize the ballot box of 1888 in West Virginia. The report reads that the few illegal votes cast resulted "through misunderstanding and in debatable cases"; that the illegal votes intentionally cast were cast without any purport of affecting the general result, and that the proclivity of men to vote because they saw others voting was especially true of men of non-voting age. Judging from the evidence at hand, however, the minority discredited any idea of "systematic fraud" and said that, "The statement that the voters of West Virginia are purchaseable in great numbers is untrue, and deserving of the scorn of honest men."[406]

The similarity between the presidential contest of 1876 and the Fleming-Goff contest in West Virginia lay in the fact that men held to their political views yet remained unified in their allegiance to their government. In neither case was there civil strife, and in each case the legislative

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[404] *Ibid.*, p. 11.
[405] *Minority Report*, p. 397.
[406] *Ibid.*, p. 398.

body automatically played its roll in the judicial manner provided.

In its report the minority expressed the opinion that the gubernatorial case was one of such magnitude that it involved more than the rights of two men; that it involved "issues vital to good government within the scope of which are the interests of the whole people of the State."[407]

To ascertain the facts under the law, which the minority declared necessary, and to scrutinize the evidence, which it said had been done,[408] the whole Committee agreed that, before a vote could be rejected, a party in a contest had to prove three points when charging that his opponent had received illegal votes. In short they were: (1) *that the person charged with illegal voting voted;* (2) *that for some specified reason or reasons he was not entitled to vote;* (3) *that he voted for the opponent.* These precepts applied to both parties in the case when specifications in each contest notice were adjudged.[409]

The majority, whose opinions in matters of policy held sway, took exception to the general rule that evidence in contested election cases should be treated the same as by courts for determining the truth of an ordinary fact. It preferred to relax adherence to the rule "when necessary, in order to reach the truth where justice might be defeated if the strict legal rules were applied."[410] The minority members were more inclined toward a stricter interpretation of the rule.[411]

In view of the relaxation of the aforesaid general rule, the evidence permitted was divided into three divisions respectively, paralleling the three points which a party had to prove of an allegedly illegal voter. They were: (1) that poll books and oral testimony were permitted *to prove that a person voted*; and (2) that circumstantial evidence and the statement of the voter himself before or at election

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[407] *Ibid.*, p. 399.
[408] *Ibid.*
[409] *Ibid.*, pp. 400-401; *Majority Report*, p. 12.
[410] *Majority Report*, p. 12.
[411] *Minority Report*, p. 408.

were acceptable *to prove how an illegal voter voted.* The majority felt, however, that a voter's statements or declarations "made so long after the election" could not be admitted as part of the *res gestae.* (3) *To prove for which candidate the charged voter voted* any facts and circumstances were declared competent, admissible, and sufficient unless refuted "by other competent proof."[412]

Here, the minority opined that *direct evidence,* rather than circumstantial evidence, should prove for whom a person's vote was cast. That it was not dogmatic in its opinion can be gleaned from its statement: "We are now of the opinion that this rule wisely administered is as fair as any, but there is great danger of the unjust use of it." It cautioned against using insufficient, flimsy, or unusual circumstantial proof in deciding for whom a voter voted. Though holding to the opinion that there is less latitude for abuse in requiring direct proof, the minority further showed a cooperative spirit in accepting the majority's view as to circumstantial evidence by writing that " . . . the wrong can not be in the use, but in the abuse of this rule."[413]

Contest committees in this country did not insist that the same strict attitude prevail to obtain the best evidence as courts required. The minority held that the burden of proof of an assailed certificate or vote was on the party making the attack. In accepting evidence, it further contended that without factual support mere statements "that voters were non-residents, minors or paupers are only to be considered as expression of opinion" and that "the opinion of witnesses should not be admitted to determine the issue in a case."[414]

Now arose the problem of counting votes which had been rejected at the polls. According to the Committee, four points which had to be proved in such cases were: (1) that the person who voted was a legal and qualified voter where he offered to vote; (2) that he offered to vote or

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[412] *Majority Report,* pp. 12-13.
[413] *Minority Report,* pp. 401, 409.
[414] *Ibid.,* p. 409; *Majority Report,* p. 13.

was prevented from voting; (3) that his vote was rejected; and (4) for whom his vote was offered.[415]

Ordinarily *prima facie* returns are accepted, but in a contest of this kind the Committee definitely decided that it was authorized by well established rules to ascertain their validity or invalidity.[416] The minority, whether or not it meant to guard the *prima facie* returns for the Republicans, reiterated that the *onus probandi* was upon the assailant of a vote.[417]

A vote was considered legal where and when the election officials had presumed it to be legal and had complied with the laws in its reception.[418] Here, the minority quoted the *American and English Encyclopaedia of Law* that when election officers had acted in this way the presumption of a vote's legality could not be "rebutted by proof of suspicious circumstances."[419] In any case where illegal votes were cast but no charges were made, the election was not to be affected unless the number was "great enough to affect the general results."[420] There seems to be no evidence that any votes were deducted which were not charged to be illegal.

The votes specified in the depositions were alleged to be contrary to one or more of five points of law in the constitution and state statutes. The points were concerned with *residency* in the state, county and/or district, the *unsound mind, pauperism, conviction under felony,* and the *minor.*[421] *National citizenship,* or *nationalization,* was a sixth point which emitted from the charges that the Committee held to be a voting prerequisite.[422] On this score several votes were voided.

Because of the diversity of opinion among text writers and courts, perhaps, the most vexing problem for the Com-

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[415] *Ibid.*, p. 13.
[416] *Ibid.*
[417] *Minority Report*, p. 403.
[418] *Majority Report*, p. 13.
[419] *Minority Report*, p. 402.
[420] *Majority Report*, p. 13.
[421] *Minority Report*, p. 400; *Constitution of 1872*, Art. IV, Sec. 1; *Code of 1887*, Chap. III, Sec. 9, p. 53.
[422] *Minority Report*, p. 405.

mittee to clarify was that of *residence* or *domicile,* both terms used interchangeably.[423] After a lengthy discussion, four principles "held to be so well established . . . as to be axiomatic" were gathered.[424] They pointed out (1) that every person must have a domicile, (2) that no person can at the same time have more than one domicile, (3) that every person who is *sui juris* and capable of controlling his personal movements may change his domicile at pleasure, and (4) that a change of domicile is a question of act and intention.[425] To help determine a voter's place of residence these maxims were used with the known facts.

Non-residency of a voter, that is not being a *bona fide* resident of the district, of the county for sixty days, nor/and of the State for one year, caused the greatest number of challenged votes.[426]

Regardless of the period of one's residing in a place, the Committee, to determine a legal domicile, judged that the fact of residence had to be accompanied by an intention "of making the place a home . . . ."[427] The intention was accepted as evidence of domicile when it was based on facts and circumstances, rather than on a mere declaration.[428] The minority's opinion accentuated the argument on intention when it held that the shortness of residence, when accompanied by an intention, "did not defeat the acquisition of a legal residence . . . ."[429] Of course this idea did not abrogate the time requirement for voting. The minority also felt that voting was evidence "of the voter's intention to claim a domicile at the place of voting."[430] The strength of the Joint Committee's position on residence evolved upon "the intent of the person . . ." which criterion applied to cases as a true test of domicile.[431]

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[423] *Majority Report,* pp. 14, 18.
[424] *Ibid.,* p. 17.
[425] *Ibid.,* p. 18.
[426] *Minority Report,* p. 404.
[427] *Ibid.*
[428] *Ibid.; Majority Report,* pp. 18-19.
[429] *Minority Report,* p. 404.
[430] *Ibid.,* p. 403.
[431] *Majority Report,* p. 18.

Several votes were rejected because of a failure to comply with the statute which mandated a voter to be a *bona fide* citizen of the district in which he voted. In this regard, the majority pointed out that the requirement was "a reasonable regulation of the constitutional right of suffrage . . ." rather than an added voting qualification and was, therefore, constitutional.[432]

Another statute of some consequence in the election contest prohibited an employee of an incorporated company or of the state from voting simply because he was employed in a different county or district than his own.[433] An example will serve to illustrate a case affected by this regulation. Goff lost the vote of one James Powers, who was believed by the majority to have possessed a legal home in Marion County, while he had voted at Latrobe House, Marshall County, near where he had been employed by the Baltimore and Ohio Railroad for three months. Though the minority felt differently, the majority may have ascertained that the facts in this case had not borne out an intention of residence in Marshall County and in a definite district.[434]

Persons of "unsound mind," as specified in the constitution, the Committee said also included idiots and lunatics, as in common law, all of whom were held to be nonsuffragists. When the assailant, by evidence, proved a case to come under this limitation, the vote was rejected.[435]

Some cases presented knotty or technical questions on degrees of mentality. The minority made the significant statement that the law was distinct but its application rendered a conclusion difficult because of the diverse statements of witnesses who knew an accused voter.[436]

If a man were of "unsound mind," incidentally continued the minority members, he could not have become the partisan of any candidate. Their belief implied that a

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[432] *Ibid.*, p. 23; *Minority Report*, p. 400.
[433] *Code of 1887*, Chap. III, Sec. 9, p. 53.
[434] *Majority Report*, pp. 19, 83.
[435] *Ibid.*, pp. 20-21.
[436] *Minority Report*, p. 406.

vote could not be rejected because the accused voter had no politics, and the rule of evidence to presume for whom he voted did not apply.[437] In other words, in such a case, it could not be known for which candidate a vote should be deducted. Nevertheless, a number of cases warrant the conclusion that the Committee accepted evidence on partisan affiliations. Among these there were several cases in which the minority unanimously concurred with the majority in rejecting votes. Some of these voters were considered Democrats and some Republicans.[438]

At least votes were not rejected if a voter had enough intelligence to comprehend the more "ordinary affairs" of his life, could care for his property, perform "ordinary labor," use and value money, do his own trading, make "his own bargains, though vacillating [*sic*] and easily persuaded, or laboring under some hallucination or illusion, which . . . [did] not extend to political affairs, or incapacitate him for business . . ." and if he understood for which candidate and/or party he voted.[439] In these cases he was not of "unsound mind" within the meaning of the law applying to suffrage.

Quite a few cases were cited by both Fleming and Goff in which the voter was alleged to be a pauper. Both groups of the Committee concurred in the opinion that, under the meaning of a statute and the constitution, a pauper was a financial unfortunate who received public aid provided by law.[440] If he were independent of aid at election time his vote was counted. The person claiming the benefit of the vote bore the burden of proving that the voter was not a pauper.[441] The minority further felt that the case of a man or his family partially assisted by the county was one which did not necessarily fall into the pauper category. Actually, cases of this nature were decided by their "own particular facts."[442]

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[437] *Ibid.*
[438] *Majority Report*, pp. 49, 56-57, 61, 67, 77, 95, 112, 113, 131-132.
[439] *Ibid.*, p. 20; *Minority Report*, p. 406.
[440] *Ibid.*, pp. 406-407; *Majority Report*, p. 21.
[441] *Ibid.*, p. 21.
[442] *Minority Report*, p. 407.

Another class of voters alleged to be prohibited from voting because they were, to quote the constitution, "under conviction of treason, felony, or bribery in an election" evoked considerable discussion. The majority members opined that a conviction in these cases was a voting disability which could be obliterated only by a governor's pardon. They held that if "conviction" ended with the "punishment" the meanings of the two terms as intended were being confused or confounded, and that punishment was merely a consequence of conviction. On these grounds the majority members by power of numbers were able to reject every vote in this class except in cases of an executive pardon.[443]

The senators of the Committee believed that, after a man had paid the prescribed penalty for a crime, it was absurd and unreasonable to deny his right of suffrage. They held that the provision was meant solely for interned prisoners, selected by a partisan prison official, who would allow those to vote whom he chose by transporting them to the polls. These Committee members interpreting the constitutional phrase "under conviction" placed emphasis on the word "under." They found it difficult to comprehend "how any one who has passed from under a thing, conviction, punishment or whatever it may be, is still under it."[444]

As to the condition of the terms *minors* and *national citizenship* there was agreement within the Joint Contest Committee. When the evidence proved an alleged voter to be under 21 years of age, thus a minor, his vote was deducted from the total of the person for whom he voted[445] which deduction was made, of course, in all cases where a vote was rejected.

Of the 15,000 pages of manuscript depositions examined by the Contest Committee[446] the testimony taken by Fleming's counsel relating to Mercer and McDowell Counties,

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[443] *Majority Report*, pp. 22-23.
[444] *Minority Report*, p. 406.
[445] *Ibid.*, p. 405.
[446] *House Journal*, p. 10.

usually under the scrutiny and frequent cross-examination of Goff's counsel, was deemed most difficult to arrange systematically. They were perhaps the most pivotal counties in the contest and deserve special consideration. Though these counties, like the other counties, were discussed separately, Fleming's deposition relating to these two were appended to the majority report.[447] Probably this testimony, rather than some other, was intended to influence the legislature and to bolster Fleming's charges of illegal voting.

The proximity of Mercer and McDowell Counties to Virginia, the influence of the Norfolk and Western Railroad (the only road in the area) and the recent growth of collieries were set forth by the majority as causes of the increase in population of these two counties. The laborers were predominantly Negro, mostly from Virginia. With two exceptions, one proved, they were alleged by witnesses to be Republicans. Elkhorn district's most remote precinct, in McDowell County, *via* the railroad was shown to be within seven miles of the old Dominion line.[448]

The depositions relating to Mercer and McDowell Counties had been taken intermittently from March 25 through May 7, at places within those counties, and a few were taken within Page and Tazewell Counties in Virginia. Fleming's counsel, at times, in these two counties was St. Clair, C. W. Smith, or John A. Douglass. Here Goff was represented by Edgar P. Rucker, J. W. Hale, or Charles P. Latham.[449]

Witnesses, some of whom were Negro miners,[450] indicated the resident status of others and sometimes of themselves. Among the many[451] were mine workers,[452] fore-

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[447] *Majority Report*, p. 87; *Depositions*, pp. 1-234.
[448] *Minority Report*, pp. 437, 457; *Majority Report*, pp. 87, 88, 89; *Depostions*, pp. 6-8, 10, 12, 14, 16, 18, 20, 22, 24, 33, 34, 44, 52, 72, 87, 89, 93, 96, 100 122, 168, 192-193, 210-211.
[449] *Ibid.*, pp. 3, 4, 48, 105, 112-126, 129, 130, 169, 183, 194, 198, 204, 207, 209-211.
[450] *Ibid.*, pp. 180-181.
[451] *Ibid.*, pp. 16, 23, 27-29, 49, 57, 67, 72. 77, 78, 83, 86, 89, 100, 103, 113, 115, 118, 120, 122, 123, 126, 127, 163, 171, 173, 175, 190, 191-199, 202, 205, 208-209.
[452] *Ibid.*, pp. 50, 95, 130, 174, 180, 181, 183, 184, 187.

men and bosses,[453] railroaders,[454] and precinct election commissioners.[455] Others who testified were operators,[456] and officers of coal companies,[457] but the most important, in view of the contest, were the payroll clerks,[458] and the bookkeepers.[459]

For the year preceding the election, the payroll clerks, and bookkeepers, by request, compared their companies' lists of workers with the persons charged by Fleming to have voted illegally. From them they filed, with their depositions, duplicated names of present and former employees, naming the months each worked.

Of fifteen companies represented those giving lists were: John Cooper and Company, Booth, Bowen Coal and Coke, Caswell Creek Coal and Coke, Goodwill Coal and Coke, and Buckeye Coal and Coke Company, all of Mercer County; Turkey Gap Coal and Coke, Houston Coal and Coke, Elkhorn Coal and Coke, Crozier Coal and Coke, Norfolk Coal and Coke, Powhatan Coal and Coke, and the Shamokin Coal and Coke Company, all of McDowell County; and the Southwest Improvement Company of Pocahontas, Virginia.[460] Pocahontas was reputed to be largely Negro and located only about two miles from Mill Creek and about one and one-half miles within the Virginia border.[461]

The poll lists where the alleged illegal voting took place completed Fleming's information concerning Mercer and McDowell Counties. These were from Mill Creek, Simmons Creek, Honaker's Mill, in Rock district; from Cross Roads in Beaver Pond district, in Mercer County; from Maybeury and Perry Bottoms in Elkhorn district, and from Board Camp precinct in Big Creek district in McDowell County.[462]

The bookkeepers and payroll clerks were further ex-

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453 *Ibid.*, pp. 13, 19, 21, 64, 74, 148, 187.
454 *Ibid.*, pp. 18, 27, 92, 172-173.
455 *Ibid.*, pp. 109-111, 134, 189.
456 *Ibid.*, pp. 143, 148, 154.
457 *Ibid.*, pp. 45, 55, 141, 169.
458 *Ibid.*, pp. 106-108.
459 *Ibid.*, pp. 4, 29, 34, 49, 57, 63, 67, 69, 109, 165.
460 *Ibid.*, pp. 5, 29-30, 34-35, 45, 49-50, 57-59, 63, 69, 71-72, 80-83, 212-226
461 *Ibid.*, pp. 9, 16; *Majority Report*, p. 87; *Minority Report*, pp. 437-438
462 *Depositions*, pp. 227-230, 232-234.

amined for other bits of information which may have helped test any of the illegal voting charges and especially to help determine the residence of voters.[463] In Mercer County, of six collieries operating at election time, the first was established in 1883 and the last in the summer of 1888. Two coal companies, of seven in Elkhorn district in McDowell County, were being developed at election time; and in the others, the majority reported, few men were employed until August 1888, when coal was transported on the railroad then completed from Mill Creek in Mercer County.[464]

Fleming's bill of particulars for the two counties declared certain votes void because of non-residency. Had he charged deliberate fraud, undue persuasion, importation of voters, or some other impropriety he would have been frowned upon by the minority members of the Joint Committee, who approved his position by affirming that none of these acts was committed at the election. No cases before the Committee proved that Goff or the Republicans unethically influenced a vote. Fleming's strongest claim was said to be that non-residents had voted without solicitation.[465] Perhaps the majority, which remained silent here, preferred to substantiate the non-resident claims. Certainly Fleming proved himself wise in limiting his claims to non-residency, because of the apparent accessibility of confirmation.

Coal barons were responsible for bringing the bulk of Negro laborers into Mercer and McDowell Counties. Unorganized labor, combined with a natural coal bin, afforded golden opportunities for a capitalist or any exploiter. The unschooled Negro, and often his white counterpart, fitted into the economic drama being written in Mercer and McDowell Counties.

Negro partisanship, descending from Carpetbagger Radicals, and, with one exception, mine owners were re-

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[463] *Ibid.*, pp. 6, 9-13, 29-32, 35, 45-47, 57-59, 63, 69-70, 71-72.
[464] *Minority Report*, pp. 437, 456; *Majority Report*, pp. 87-88.
[465] *Minority Report*, pp. 436-437.

puted to be Republicans.[466] At least the Negro's presence at pre-election Republican meetings, in Mercer and McDowell Counties marked a partisan curiosity. The minority members protested, however, against witness' opinions, in depositions, that the Negro was Republican because some of them had applauded at a political meeting. This idea they considered a generalization, especially since the Negroes could not be specifically identified.[467] In truth, such may have been generalizing, though evidence when general and specific too often coincided to dismiss the idea of the "generalization."

Opposing the majority, the minority members deplored accepting the evidence which was rendered in Mercer and McDowell County depositions to determine men's origins and political affiliations. The evidence was considered to be general, inconclusive, garbled, and based on guarded expressions of witnesses. They strongly urged that such evidence should not be accepted, holding that it was "highly improper and unjust" to deduct votes from the contestee "on the evidence of a few men" and pointing to the "general political reputation of a mass of unrecognized, unidentified persons."[468]

Before the day of the colliery, the whole Committee agreed that there were few Negroes in Mercer or McDowell Counties.[469] Census reports for both counties gave 369 Negroes in 1880 and 3,613 in 1890. The white increase, though comparably less than the Negro increase, had soared higher in each of these counties than in any other county in the state, except Cabell and Fayette Counties.[470] To interpret the picture more clearly, one might consider the majority report. It claimed two-thirds of the laborers employed in the collieries to be Negro, the im-

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[466] *Majority Report*, p. 88.
[467] *Ibid.*, pp. 88-90; *Minority Report*, pp. 457, 465.
[468] *Ibid.*, pp. 458, 464-465.
[469] *Ibid.*, p. 437; *Majority Report*, p. 88.
[470] See Table I, pt. I, "Gubernatorial Election Contest, 1888-1890," in WEST VIRGINIA HISTORY, (April, 1946), pp. 213-214.

plication being that many of them were newly arrived and, consequently, had a suspicious legal domicile.[471]

The majority considered the Negro to have been a migratory people "coming and going all the time," along the Virginia-West Virginia border, with no intention of accepting permanent employment.[472] This was an effort to prove them to have no political residence. The minority members, rejecting the idea, believed that men's failure to work regularly did not affect their domicile and further cited authorities who wrote that "the habits of [all] our people are migratory" but that they still had "true homes and political domiciles." They indicated, thus, that one always has a legal residence some place.[473]

However correct the minority may have been, the majority believed that for voting purposes one had to meet the resident time requirements. The minority did not mean to deny this requirement, but it implied that one need not to have remained continuously in the state for one year, in the light of his intention to be a citizen.[474]

The minority complained that Negroes could have come from within the state, perhaps from the large Negro population of Jefferson or Kanawha County, rather than from Pocahontas, or elsewhere in Virginia;[475] and that many could have met the citizenship requirement a year before the election, certainly as early as 1883, when the first colliery was established.[476] The number that had may never be known.

The minority furthermore maintained that the fact that a person's name did not appear on a company payroll was insufficient proof that he was a non-resident of the state. They pointed out that a man might have resided within one state border, for example Mill Creek in Mercer County, and worked in another, as in Virginia. A duplication of

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[471] *Majority Report*, p. 88.
[472] *Ibid.*, p. 89.
[473] *Minority Report*, pp. 456, 458-459.
[474] *Ibid.*, p. 461.
[475] *Ibid.*, p. 457.
[476] *Ibid.*, pp. 463-464.

names likewise caused the majority to reject votes.[477] These were found on West Virginia payrolls and compared with the payroll of the Southwest Virginia Improvement Company or with the voters' registration book of Clear Fork district, Tazewell County, Virginia.[478] The minority held that a person whose name had been duplicated in Virginia should not have his vote rejected until it was absolutely proved that he had been registered twice. A duplication of names, they insisted, was a common occurrence among the Negro, one manufactory having been compelled thereby to designate certain employees with numbers.[479]

Most affected by the majority's deduction of votes for non-residency were Negro Republicans. In all, from Mill Creek, Simmons Creek, Cross Roads, and Oakvale precincts in Mercer County and Perry Bottoms and Maybeury precincts in McDowell County, Goff lost 204 votes and Fleming lost six. On 190 of the rejected Goff votes, the minority failed to concur.[480]

After the Committee had coped with the difficult situations in Mercer and McDowell Counties, they had yet to solve many problems in regard to the voting in the important counties of Kanawha, Braxton, Ohio, and Brooke.

In Kanawha County the certificate for governor, certified to the secretary of state, was based upon the recount, except for Alum Creek, St. Albans, Charleston, Lewiston, and Coalburg precincts. For the first three precincts the *original returns* were counted. The last were entirely ignored because the commissioners there had not taken oath before entering upon their duties.[481] Complying with its primary regulation on unsworn commissioners, the Committee counted these two precincts.[482]

The original certificate gave Fleming 3,082 votes and Goff 4,601.[483] The majority blamed the court commis-

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477 *Ibid.*, pp. 461-462.
478 *Majority Report*, p. 89.
479 *Minority Report*, p. 462.
480 *Ibid.*, p. 437; *Majority Report*, pp. 90-91, 153; Table IV, pt. I, WEST VIRGINIA HISTORY (April, 1946), pp. 219-220.
481 *Majority Report*, pp. 63-65.
482 *Ibid.*, p. 66.
483 *Ibid.*, p. 64; *Minority Report*, p. 394.

sioners' bias for causing the certificate to be signed without due evidence.[484]

Kanawha County Circuit Court annulled the original certificate and referred the election to the Joint Committee for decision, after Fleming obtained a writ of *certiorari* and *supersedeas,* affirmed by the Supreme Court, to review the recount.[485] The minority held that the subject matter lay within the jurisdiction of the legislature and not within the jurisdiction of the courts.[486]

Upon investigation, the Committee found that *all* the *original counts* in Kanawha gave Fleming 3,283 votes and Goff 4,794 and *all* the *recount results* gave Fleming 3,296 and Goff 4,779.[487] Twenty-two votes rejected from the recount total gave the result tabulated: for Fleming 3,295 votes and for Goff 4,758.[488]

In Braxton County a district line had been changed in 1874. Goff, on the belief that the change was illegal, contested thirty-seven Democratic votes. These were of voters who lived in the area that had been transferred from Otter district to Holly district.[489] Fleming submitted evidence from the county court showing the order of the justices of peace changing the Otter-Holly line, and an order of the justices, in 1875, defining the Holly voting district.[490]

The majority members, quoting the law, had credence in the legality of the change, and, thus, in the validity of the votes cast in the disputed area. Consequently, the judgment of the county court ordering the change was not impeached. Lest they err in their opinion they qualified it by declaring that the changed line was based, at least, on "the color of a legal order and the voter . . . [was] not to be disfranchised because the court did not properly act, if that were the case." They reiterated that

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[484] *Majority Report,* p. 64.
[485] *Ibid.,* p. 64.
[486] *Minority Report,* p. 432.
[487] *Majority Report,* pp. 63, 66.
[488] *Ibid.,* pp. 67, 153; Table IV, pt. I, WEST VIRGINIA HISTORY (April, 1946), pp. 219-220
[489] *Majority Report,* p. 24.
[490] *Ibid.,* pp. 24-25.

one entitled to vote should not be deprived of his privilege by actions of authorities.[491]

The minority backed Goff's contention that the justice might have acted without jurisdiction due to the fact that no evidence could be found of a court order, a primary requirement in the law, calling the justices to consider changing the district line. But because of the doubt in the case they did recommend, though the contestant or contestee might win through rejected votes, that the votes be counted on the ground that innocent voters were confused as to their voting precinct.[492]

For Ohio County no evidence of district lines could be found in the offices of the secretary of state or the clerk of the county court. If ever there were any records, which the law required, apparently they had been insecurely guarded or preserved. Nonetheless, the minority applied to the Ohio County question a view similar to that used in Braxton County. It was acceptable to the majority, which wrote no special report about Ohio County. The minority members may have felt a need to mention the question, perhaps for consistency's sake, or wished to show an impartial attitude. Too, the majority may have wished the minority to recite the case.

Had the minority members not upheld the thirty-five Democratic votes, which Goff opposed, certainly the majority, stronger by one vote, would have won a decision. The minority refused to reject these votes, for they claimed proof of districts was essential before votes could be rejected.[493]

Seventy votes in Wellsburg and Cross Creek districts in Brooke County were disputed by Fleming.[494] The corporate limits of Wellsburg were conterminous with the district of Wellsburg until, as the minority claimed, they were extended in 1877 by the circuit court.[495] Because of

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491 *Ibid.*, p. 50.
492 *Minority Report*, pp. 435-436.
493 *Ibid.*, pp. 415-416.
494 *Majority Report*, p. 36.
495 *Ibid.*, p. 37; *Minority Report*, pp. 428-429.

the absence of a record, the majority members refused to consider the extension. They said, furthermore, that if the circuit court had changed the town boundary it had no authority to go beyond the law and, thus, infringe upon the jurisdiction belonging to the justices of peace. According to the constitution only the justices of peace were allowed to change the magisterial voting districts.[496]

To muster strength the minority cited instances recognizing the alleged new district lines. The foremost instance, which was cited, took place on August 13, 1878, when the county court conceded the change by ordering a new voting place for Cross Creek district. This it did because the former voting place was located in the area supposedly included in the Wellsburg district.[497] Nonetheless, in this affected area Fleming won the day.[498]

The facts in the Ohio and Braxton County cases were more obscure than in Brooke County, for the justices alone had authority to change the voting districts, there was no record. The circuit court was empowered to change only the town line of Wellsburg.[499] Through the majority's eye these facts nullified the votes; but the minority members, also with valid arguments, said that the voters polled at the only place available, and where they had voted for ten years. They preferred adherence to the legal maxim, "when a vote has been received . . . by officers who have complied with the law in its reception, the law will presume that the vote is legal."[500]

Willingly the minority members referred to the majority's decision in Braxton County. They claimed that an irregular order in Brooke County ought to be sufficient to change a district line if an irregular order, as they termed it, were sufficient in Braxton County. They quoted verbatim the majority's declaration (Braxton County) that

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[496] *Majority Report*, pp. 37-38; *Constitution of 1872*, Art, VIII, Sec. 25.
[497] *Minority Report*, pp. 428-429.
[498] *Majority Report*, pp. 38, 153; Table IV, pt. I, WEST VIRGINIA HISTORY (April, 1946), pp. 219-220.
[499] *Majority Report*, p. 37, paraphrasing Chap. LXXVIII, Sec. 6, p. 112, *Acts of 1877*.
[500] *Minority Report*, p. 429.

the change had the color of legality and that authorities' actions could not deprive one of his voting right.[501]

The problems arising from Mercer, McDowell, Kanawha, Braxton, Ohio, and Brooke Counties required more committee work than those from elsewhere. Problems from other counties were ephemeral in comparison, though collectively the individual votes treated in them, mostly through the majority, aided in voiding enough Republican and Democratic votes to give Fleming a lead of 237 votes. Only thirteen of the 54 counties remained unscathed by the charges and by committee work.

A tabulation by the Democratic majority counted 78,697 votes for Fleming and 78,460 for Goff; and on the strength of these, the majority reported that Fleming had been the candidate elected.[502] Holding to its views, the minority accredited Goff with 78,792 votes and Fleming with 78,652, an insecure but true lead of 140 votes for Goff, and recommended that "Goff be placed in the possession of the . . . office until the . . . contest . . . be disposed of."[503]

Even though they may have endeavored to interpret problems unbiasedly the political leanings of both Republican and Democratic members of the Joint Committee are apparent in their reports. It is difficult to say that the Committee, chained to politics, can be credited with solving the contest, for the facts were often too controversial for settlement. Its greatest achievement was the gathering of evidence and calling it to effect conclusions. The legislature received the fruits of the work.

THE DECISION

Governor Wilson's message of December 18, 1889, calling an extra session of the legislature to consider primarily

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[501] *Ibid.*, pp. 429-430.
[502] *Majority Report*, pp. 153-154; Table IV, pt. I, WEST VIRGINIA HISTORY (April, 1946), pp. 219-220.
[503] *Minority Report*, pp. 467-468.

the settling of the gubernatorial contest,[504] brought about a renewal of faith among the Democrats and Republicans in the right of their respective views. This renascence of feeling followed the many dismal months of waiting for the time when the election of 1888 would be settled.

As a judicial body, the joint session of the legislature met for the first time on Thursday, January 16, 1890, to try the case of Fleming *vs.* Goff.[505] Astute representatives of political circles and the people were drawn together to name West Virginia's new governor. We are told by a Republican journal that Fleming's success was generally conceded, though some of his friends remained doubtful of it.[506] The Democrats who had apprehensions realized the extremely close partisan alignment between Fleming and Goff men in the joint session.[507]

Roger P. Chew, Alexander C. Moore, and John M. Sydenstricker of the house, and George E. Price and Presley W. Morris of the senate were appointed a committee on rules to determine regulations for the government of the joint session.[508] The legislature accepted the five rules presented on January 20 and 21 by the committee chairman, Mr. Price; and at 11 o'clock on the morning of January 22 the struggle began.[509] Okey Johnson, as counsel for Fleming, opened the debate, and, following the Goff argument, St. Clair concluded it within the five hours allowed the contestant for the closing round. William P. Hubbard argued for Goff and was followed by Goff in his own behalf.[510]

While the committee on rules was convening, Hubbard approached it and suggested that Fleming be invited to argue his case.[511] This wedge, of course, could be interpreted as an effort to obtain a hearing for Goff, who rea-

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[504] *House Journal*, 1890, pp. 4, 10.
[505] *Ibid.*, pp. 32-33, 469.
[506] *The* (Weekly) *State Journal*, January 16, 1890.
[507] *Ibid.*, January 23, 1890; Wheeling *Register*, February 5, 1890.
[508] *House Journal*, 1890, p. 469.
[509] *Ibid.*, pp. 469-470.
[510] *Ibid.*, pp. 471-474; *The* (Weekly) *State Journal*, January 24, 1890; Wheeling *Register*, January 23, 1890.
[511] *Ibid.*, January 20, 1890.

lized his oratorical capabilities. Contrariwise, though Fleming was a good and earnest persuader, he was not a Cicero, nor did he possess any of Goff's captivating flash.[512] Answering Hubbard's suggestion, which had reached him through the papers, Fleming discreetly wrote to St. Clair from Fairmont that he had confidence in the ability of his counsel, and that "it would be out of place, indelicate and presumptuous, for the parties to appear . . . in the attitude of counsel." Though Democrats were divided on the proposition of allowing Goff to speak, Fleming at the same time made it clear that he did not object to Goff's arguing his own case, if the joint assembly were willing.[513]

Consequently, among the rules presented to the joint session, there was one which permitted either the contestant and/or the contestee to appear within the time allowed for each counsel's argument.[514] Fleming kept his word not to appear before the bar for himself. Throughout the proceedings he could often be found among his Democratic friends within the rear of the assembly chamber.[515] Goff and his counsel sat near the bench, and when Hubbard finished the contestee's opening argument, his client, despite Democratic chiding, rose and availed himself of the opportunity to speak. His utterances brought a gusto of plaudits from admirers and derision from his opponents.[516]

Under the rules the majority and minority of the Contest Committee were each permitted six hours "to discuss the matters involved in the case," with the chairman having the right to conclude the discussion.[517] Sprigg spoke for the majority, and Maxwell and Morris divided the minority time between themselves and addressed the assemblage. Under the accepted rules, committee members

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[512] MacCorkle, *op, cit.*, pp. 432-435; *The* (Weekly) *State Journal*, January 30, 1890.
[513] The Charleston *Daily Gazette*, January 24, 1890: Wheeling *Register*, January 20. 1890.
[514] *House Journal*, 1890, pp. 470-471.
[515] Wheeling *Intelligencer*, January 24, 1890.
[516] *The* (Weekly) *State Journal*, January 30, 1890; Wheeling *Intelligencer*, January 25, 1890; Wheeling *Register*, January 23, 1890; T. S. Riley to Fleming, January 23, 1890, Fleming MSS.
[517] *House Journal*, 1890, p. 471.

could yield some of their time to members of the legislature. As a result, Samuel L. Flournoy and Price each expostulated the Democratic view for one-half hour through the courtesy of Chairman Kee, who followed them.[518]

Rabid partisanship formed the core of all these harangues. They dealt with sundry matters in the Contest Committee's reports and frequently dwelt on isolated voting instances, according to speakers' views. Various arguments, some questionable, and the Supreme Court cases were used as battering-rams in the verbal melee. As he saw them, each speaker gave his rendition of the wrongs in the case, and drove them against the opponent. In newspapers, the defense speeches and those of the Contest Committee and of the two legislators who spoke were denounced and eulogized along party lines. Regardless, considered together the speeches themselves are imponderable.[519]

Democratic arguments declaimed their position and their right to protect themselves from being fraudulently deprived of the state's most influential office. Republicans derided the 46-45 vote of the 1889 legislature not to declare which candidate was elected until the illegal voting charges were probed. They declared that the *prima facie* returns should have been given first consideration, and that no systematic fraud existed at the election. Before his listeners Goff himself said that the case was not a "personal controversy" but one of the people who elected him. He further declared that trainloads of voters were not brought into the state in Mercer and McDowell Counties, and that no colonizers were brought into those areas for voting purposes.[520]

The statement that there was no systematic fraud was apparently true. If one wishes to call votes fraudulent on

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[518] *Ibid.*, pp. 471, 474-477; *The* (Weekly) *State Journal*, January 30, and February 1, 1890; Wheeling *Register*, January 31, and February 1, 1890.

[519] *The* (Weekly) *State Journal*, January 25, and 30, 1890; *The* (Weekly) *State Journal* Supplement, January 30, 1890; Wheeling *Intelligencer*, January 24, 25, and 30, 1890; Wheeling *Register*, January 27, and 28, 1890.

[520] *Ibid.*

the grounds of non-residency, minority, pauperism, insanity, conviction for felony, and/or non-citizenship then the term applies. Here a distinction ought to be drawn between illegal votes and votes cast fraudulently, that is, influenced by undue means. No evidence at hand, however, supported the charges of *systematic* fraud or vote buying.

An isolated incident in the speeches exhibits the strategy used by each side to enforce its views on the audience. This instance refers to poll lists. In their arguments Hubbard, and on the following day, Goff had accused the majority of the Contest Committee with the responsibility of having rejected Goff votes in Mercer and McDowell Counties, when the voters' names were not in the poll lists. A like imputation had been made, according to Kee, chairman of the Contest Committee, when Hubbard, the day preceding his speech, had been permitted to eye the poll lists printed in the majority report. Kee was amazed, because Hubbard was sustained by the majority report.[521]

The Democrats, after an investigation, said that Goff had in his hands the *original* poll lists when he made the charge and implied that Hubbard knew of them, for, they said, it was he who gave them to Goff. St. Clair said Hubbard possessed the original lists for twenty-four hours before making his speech. When the original lists were returned to Kee after Goff's tirade, Kee therein discovered the names of all the rejected voters. The majority had simply erred in copying the lists into its report.

St. Clair said both Hubbard and Goff based their argument on a "false and deceitful assumption."[522] Before the assembly Goff chided St. Clair for remaining silent when he publicly asked for certification of the lists and the case as he had painted it. St. Clair explained that he remained reticent because he did not propose to help Goff's argument.[523]

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[521] *The* (Weekly) *State Journal*, January 25 and 30, 1890; Wheeling *Register*, January 25, 1890.

[522] *The* (Weekly) *State Journal*, January 30, 1890; Wheeling *Register*, January 25, 1890; Wheeling *Sunday Register*, January 26, 1890.

[523] Wheeling *Sunday Register*, January 26, 1890.

On Friday, January 31, the last argument was made by Kee as chairman of the Contest Committee. Immediately thereafter he resolved, in compliance with an accepted regulation reported two days previously by the majority of the committee on rules, that, because of the evidence and the reports, Fleming be "declared to have been duly elected . . . . " Price, however, apparently, because of the late afternoon hour, moved for the adjournment until the next day, Saturday, which motion was sustained by the body.[524]

Another anticipated moment in the contest was due to arrive but not without an obstruction. The Wheeling *Register* reported that there was a Republican effort to search for an "honest man" whose vote could be bought.[525] William A. MacCorkle in his *Recollections of Fifty Years,* tells us that two necessary votes were unpredictable.[526] What transpired on the next day may have been a threat of the Democrats to keep party weaklings in line. It is possible, however, that the evidence found in the *House Journal* and newspapers is representative of the facts.

Nonetheless, just as the resolution declaring Fleming elected was about to be considered, delegate David M. Harr of Marion County, arose to a question of privilege and sent a manuscript to the clerk's desk to be read.[527] A stillness cloaked the joint session during the reading of the paper. In it Harr related a story of bribery which, with any other discovery of an attempt to influence voters improperly, a committee was appointed to investigate and report to the joint session. The committee men were Price, Nathan B. Scott, David W. Shaw, Alexander C. Moore, and Roger P. Chew.[528]

According to Harr's story, A. R. Stollings, engrossing clerk of the senate, sent for Harr while he was in the

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[524] *House Journal,* 1890, pp. 475, 477; Wheeling *Intelligencer,* February 1, 1890: Wheeling *Register,* February 1, 1890.
[525] *Ibid.,* February 1, and 27, 1890.
[526] MacCorkle, *op. cit.,* p. 441.
[527] *House Journal,* 1890, pp. 478-479.
[528] *Ibid.,* p. 479; Wheeling *Register,* February 3, 1890; Wheeling *Sunday Register,* February 2, 1890.

Opera House Friday evening and offered him $1800.00, if he would vote for Goff. He also promised Harr the mine inspectorship of the first mining district of the state, if Goff were elected. Harr pretended that he wanted the money before voting and refused even to agree to vote for Goff, unless he received one-half the amount offered. Stollings preferred to wait until the morning and after consulting friends would pay $900.00, in which case Harr agreed that he would vote for Goff.[529]

In his statement Harr clearly stated his adherence to Fleming's cause. To explain his position and objective, Harr further wrote, "in view of the fact that there has been so much said by . . . Goff and his friends . . . that there was no fraud in the election . . . I regarded it my duty to listen to the corrupt propositions of this Republican official, to which I have referred, and to expose the same to this Joint Assembly."[530]

Among the many remarks Morris considered the affair a plot to discredit Goff and wanted the joint session to continue its work before making an investigation. Alexander R. Campbell insinuated that "the communication was only a Democratic move to gain time." On the other hand, Kee in his speech, tried to implicate W. J. W. Cowden, chairman of the state Republican executive committee, in political improprieties and Price made the motion establishing the investigating committee.[531]

In the interim, a Democratic effort to win the contest got under way two days before the final voting was expected and the Harr charges were made. From the time that MacCorkle had, of his own volition, instituted Fleming's recount in Kanawha County he had been left out of the contest proceedings and, as he said, "had been dismissed summarily." He blamed Henry S. Walker for his "undoing." On Thursday, Walker had entered MacCor-

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[529] *House Journal*, 1890, p. 478; Wheeling *Register*, February 3, 1890; Wheeling *Sunday Register*, February 2, 1890.
[530] *House Journal*, 1890, pp. 478-479.
[531] *Ibid.*, p. 479; Wheeling *Register*, February 1, 1890; Wheeling *Sunday Register*, February 2, 1890.

kle's office and asked him to overlook his personal feelings for the sake of his political tradition and because the Democratic vote was narrowed down to two persons. One, he said, could be influenced only by MacCorkle.[532]

Walker explained that it was understood that Senator Azel Ford of Raleigh County was not satisfied with the majority testimony and intended to support Goff. He said Ford was interested with a J. C. Bullett, a Democrat in Philadelphia, "in some very large interests" of the Norfolk and Western Railroad. It was believed that Bullett could influence Ford. MacCorkle left immediately to see his old college mate, Josh C. Bullett.[533]

At ten o'clock Friday morning MacCorkle arrived in Philadelphia, and was amazed by Walker's mistake which he discovered when Mrs. Bullett, in the office, introduced him to Bullett. The man explained that he was L. C. Bullett, a cousin of Josh C. Bullett. MacCorkle was perplexed and, as an only course, boldly explained his mission. Bullett was not disposed to interfere and practically dismissed the conversation, when Mrs. Bullett intervened.[534]

MacCorkle was encouraged, when Mrs. Bullett explained to her husband that she was a southern Democrat and that she knew MacCorkle's people in Virginia. She felt that MacCorkle should be heard and suggested that Bullett go to West Virginia with MacCorkle. The three parties arrived at the Charleston station Saturday morning at twelve o'clock, and were met by Walker who told that Ford had freely expressed himself for Goff.[535] Immediately after Harr's charges and the partisan discussion relating thereto, they all arrived at the capitol in a swiftly moving carriage.

Maxwell had just offered a substitute resolution for the one declaring Fleming governor. The substitute declared Goff duly elected, but before it could be finally considered

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[532] MacCorkle, *op. cit.*, pp. 439-441.
[533] *Ibid.*, pp. 441-442.
[534] *Ibid.*, p. 442.
[535] *Ibid.*

Bullett and his wife walked over to Ford, amidst the intense excitement. Mexico Van Pelt craftily moved for an adjournment until Tuesday morning, which motion, against Republican wishes, carried by a 46-40 vote, leaving the investigating committee time in which to work and also allowing enough time for Bullett to convince Ford of a need of voting for Fleming.[536]

Since partisanship was paramount on both sides, Fleming probably would have been elected, at this time, by a vote of 44 to 42. The Democrats must have felt, however, that they could not take a chance to lose, or that they should not risk a break in their political solidarity. This 44-42 conjecture gives the Republicans the votes of Ford and the other Democrat, Lindsey Merrill, delegate of Wirt County, whom Walker had mentioned to MacCorkle. Carr, the labor man and presiding officer of the joint session, is computed among the 44. It was during the elapsing period between Saturday and Tuesday that both these Democrats who had wandered from the fold were brought within the political confines of their party.[537]

During the reading of Harr's paper, Goff sat amidst his Republican friends. When the assembly was almost clear Goff and Hubbard approached Stollings in the rear of the chamber, where he had stood throughout the making of the charge against him. It appeared that they questioned and advised Stollings.[538]

At the investigation, in the room of the senate committee on the judiciary, held privately against Hubbard's wish, those concerned appeared. Stollings was accompanied by his counsel Wesley Mollahan and Henry C. McWhorter; Harr was accompanied by St. Clair. At great length Harr testified, and was cross-examined until the adjournment. His testimony was substantially the same as his charges, except that he described a previous effort of Stollings to bribe him. Harr made it clear that the

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536 *House Journal*, 1890, pp. 479-480; 483-484.
537 MacCorkle, *op. cit.*, pp. 443-444; *The* (Weekly) *State Journal*, February 6, 1890.
538 Wheeling *Register*, February 3, 1890; Wheeling *Sunday Register*, February 2, 1890.

incidental reference in his notice to the joint assembly stating that he had seen the money, was a misunderstanding on the part of St. Clair who prepared the writing.[539]

After a Sunday of high speculation on political matters in Charleston,[540] the investigating committee resumed its searching. Among several witnesses the most important to the case were Henry Cunningham, state mine inspector, Stollings, Carr, and Goff. Cunningham said that he was told by Stollings that $1200.00 might be secured to influence votes for Goff, that Goff could be seated, and that Harr was the weakest member in the house of delegates. He said, however, that he had had no conversation with Stollings "to bribe Harr." In regard to an interview he had had with Goff, Cunningham denied ever offering him the mine inspectorship, meaning of course, as a gift for someone.[541]

Stollings denied the charges placed against him. He said that on Friday evening, January 31, someone, whom he did not know, informed him in the hall of the Ruffner Hotel that "Dave" Harr wished to see him. Delegate Adam E. Aultz of Kanawha County, accompanied him as far as the Opera House. Stollings said that in a note he had asked to come out but neglected to inquire of his business. According to Stollings, Harr had revealed that he was asked by Azel Ford to vote for Goff and was impressed with Ford's reasoning. Not only this, said the witness, but Harr wanted a meeting with Ford to be arranged by Stollings.

Stollings stated that he had returned to the Ruffner Hotel in an unsuccessful search for Ford. He then proceeded to a place near the Opera House, where he said he had, as planned, met Harr, accompanied by his cousin, John M. Harr.[542] It was learned in Harr's testimony that his cousin at this point had returned to the Ruffner

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[539] *Ibid.*
[540] Wheeling *Register*, February 3, 1890.
[541] *Ibid.*, February 4, 1890.
[542] *Ibid.*

Hotel.[543] Stollings testified that Harr and he moved up Capitol Street and at the Capitol their conversation terminated.

Stollings related that he hoped Harr would vote with Ford but that money was not mentioned. He said that on Saturday morning he saw Ford and Harr conversing at the door of the joint assembly and, in passing, he quickly whispered to Harr, "I see you have your man."[544] Harr had testified that on that morning Stollings, in the assembly hall, said he had the money in his pocket.[545]

Carr's testimony is similar to and reaffirms that of Harr. He recalled being told by Harr of the Stollings meeting and of suggesting that Harr play the game. He had further suggested that Harr have a paper containing the facts made out by St. Clair for presentation to the joint assembly.[546]

Goff had spent the entire day observing the proceedings and in the evening, shortly after eight o'clock, he testified. His honesty and truthfulness, which he mentioned, were not questioned and in no way was he embarrassed. He said that if it had not been for the manner in which his name became involved in the case he would not have requested to appear before the committee. Goff declared that he had never spoken to Stollings about Harr's vote and had not agreed to give money for it. He said, furthermore, that he had never promised any offices in return for votes and that Stollings had had no power to promise the mine inspectorship, if he did.

Cunningham had called upon him in his room in the Ruffner Hotel, Goff revealed, and complained that his office was being raided, that he intended to resign and have Governor Wilson appoint Harr. According to Goff, Cunningham had thought this would assure one less vote for Fleming. When Goff asked him to discontinue his conversation, he left the room.[547]

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[543] *Ibid.*, February 3, 1890; Wheeling *Sunday Register*, February 2, 1890.
[544] Wheeling *Register*, February 4, 1890.
[545] *Ibid.*, February 3, 1890; Wheeling *Sunday Register*, February 2, 1890.
[546] Wheeling *Register*, February 4, 1890.
[547] *Ibid.*

When the joint session convened, Tuesday morning, Chew, Shaw, and Chairman Price, Democrats, presented a laconic report. It held that the evidence in the Stollings-Harr case was of such a contradictory character, embracing Harr's charges and Stollings' denial, that they could not feel justified in saying the charges were sustained or that the evidence justified any further action by the joint session.[548]

Though Moore and Chew, Republicans, agreed to the foregoing report, including the statement that Stollings' explanation was unsatisfactory, they took exception to the majority statement that the evidence "was sufficient to create in our minds a grave suspicion" that Stollings had made improper proposals to influence Harr.[549] Perhaps their exception also was intended to nullify the view that Stollings' explanation was unsatisfactory.

Carr, the presiding officer of the joint session, upon request, caused a statement by Moore to be entered upon the *House Journal*. It stated that nothing was disclosed in the investigation to implicate Fleming or Goff "in any improper measures to influence any vote . . . ."[550]

The tall angular Mr. Ford was then heard. He said that in justice to himself, because his name had been connected with charges of corruption, he wished an apologetic letter which he had received from Harr to be recorded in the minutes. This was done. In this significant letter Harr cited his testimony before the investigating committee in which he had referred to a conversation he had had with Ford on the previous Friday evening, the same evening Stollings had talked with Harr. It should be mentioned here that Harr had told the Committee that Ford had offered him a mine superintendency, if he would vote for Goff.

In his letter Harr said that he had not intended to intimate that he regarded Ford's offer as a bribe or induce-

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[548] *House Journal*, 1890, p. 481.
[549] *Ibid.*
[550] *Ibid.*, pp. 481-482; *The* (Weekly) *State Journal*, February 6, 1890.

ment but rather he intended to show it to be an expression of Ford's friendship to be manifested independent of Harr's action in the choice of governor.[551] Though in the joint session he voted with the Democrats,[552] this splitting of hairs may be indicative of Ford's real sympathies, it would seem. It may also have been a Democratic attempt to vindicate him.

Amidst anticipation the members of the joint session had passed through the portals of the assembly hall to their seats at ten o'clock on that historic Tuesday morning of February 4. Visitors were numberless. The hour of triumph and defeat had really come. During the preceding twenty-four hours, it was reported, the Democrats had readied themselves for the final voting. The Republicans, too, remained tense and hopeful.[553]

Immediately, after Harr's letter to Ford was read, after the report of the investigating committee was received, and after the investigating committee was discharged, Carr, presiding officer of the joint session, called the session to order. He announced that the substitute resolution declaring Goff elected was the first business for consideration.[554]

Price opposed the resolution's wording as being contrary to an accepted rule made by the committee on rules.[555] After assurances from Morris and the resolution's sponsor, Maxwell, that the resolve would be considered in the same manner as a prescribed resolution, Carr ordered the question. Without any further ado the voting began. Every Republican voted in the affirmative and every Democrat voted in the negative. A short time after the roll call was completed the clerk declared that the substitute resolution was lost by a vote of 40 to 43.[556]

When Senator John W. Arbuckle of Greenbrier County, rose to vote, he explained that the question was whether

551 *House Journal*, 1890, p. 482; Wheeling *Register*, February 5, 1890.
552 *House Journal*, 1890, pp. 480, 483, 481.
553 Wheeling *Register*, February 5, 1890.
554 *House Journal*, 1890, pp. 481-482; Wheeling *Register*, February 5, 1890.
555 *House Journal*, 1890, p. 475; Wheeling *Register*, February 5, 1890.
556 *House Journal*, 1890, p. 483; Wheeling *Register*, February 5, 1890.

Fleming or Goff received a majority of the legal votes cast. He did not believe the case was one of personal fraud against either man, but he understood that fraudulent votes had been cast and that they should be eliminated. With that in mind he was convinced that Fleming had received a plurality of votes. Moore claimed that both the majority and minority reports could be used to prove "everything and anything" in the case and, probably basing his views on the original *prima facie* returns and on his party affiliation, voted for Goff.[557]

Though his voting with the Democrats on the previous Saturday for the adjournment[558] signaled his position, Carr, the Laborite, who often seemed to possess a quintessence of political strategy, remained a matter of some speculation. He dispelled all doubts when he gave his support to the Fleming forces rejecting the substitute resolution.[559]

The original resolution declaring Fleming the duly elected governor recurred.[560] The voting was interspersed with a few voters' short speeches. After the roll was finally called the clerk tabulated the result. "As the hands of the Capitol clock pointed to the hour of twelve," February 4, 1890, precisely eleven months past inauguration time, the clerk announced that Fleming had been officially declared governor by a vote of 43-40. Carr declared the resolution adopted.[561] The votes of Carr and the two Democratic voters who were held in line, proved to be, for the Democrats, the victorious turning point in the contest.

After the applause, the joint session, upon the motion of the aged Senator Joseph Snider of Monongalia County, adjourned *sine die*. Thus ended the first judicial court of its kind in the history of West Virginia.[562]

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557 Wheeling *Register*, February 5, 1890.
558 *House Journal*, 1890, p. 480.
559 *Ibid.*, p. 483; *The* (Weekly) *State Journal*, February 6, 1890; Wheeling *Register*, February 5, 1890.
560 *House Journal*, 1890, pp. 483-484; Wheeling *Register*, February 5, 1890.
561 *House Journal*, 1890, p. 484; Ambler, *op. cit.*, p. 462; *Appletons'*, New Series, XV, p. 853; Callahan, *op. cit.*, pp. 245, 446.
562 *House Journal*, 1890, p. 484; *The* (Weekly) *State Journal*, February 6, 1890; Wheeling *Register*, February 5, 1890.

Both Fleming and Goff were tactfully absent from the assembly hall when the result was declared. But at the Ruffner Hotel, Fleming was given an informal ovation by both Democrats and Republicans.[563] Congratulations were heaped upon him for several days.[564] Due to their success St. Clair and other Democratic leaders were fraught with generous phrases of well wishers.[565]

In the afternoon Fleming and some friends consulted with Governor Wilson who, because he no longer considered himself entitled to office, wished Fleming to assume "the duties as soon as possible."[566] In the evening, John M. Hamilton, clerk of the house, presented the governor-elect with a commission on which to base his claim to office, the first document of its kind in the state's history.[567]

As the last morning hour of February 6 approached high noon Fleming descended from his room in the Ruffner Hotel and was met by Governor Wilson, other state officers, and friends. With Wilson and Fleming in the lead they formed a procession and walked to the Capitol, escorted by Governor Wilson's guard.[568] Of this incident the Charleston *Gazette* wrote, "The march was begun, and thus in true Jeffersonian simplicity the Governor [Fleming] . . . walked to his inauguration."[569] A motley crowd milled about the Capitol steps as the party approached. Near the gate in a carriage were Mrs. Wilson and Mrs. Fleming.[570]

Besides Wilson and Fleming there were assembled on

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563 *Ibid.*, February 5, 1890.

564 *Ibid.*, February 5, 1890; John E. Kenna and Charles J. Faulkner to Fleming, February 4, 1890; E. Boyd Faulkner to *id.*, February 4, 1890; J. A. Fickinger to *id.*, February 4, 1890; D. W. Gell to *id.*, February 4, 1890; John C. Pendleton to *id.*, February 4, 1890; Charles Powell to *id.*, February 4, 1890; T. F. Rowand to *id.*, February 4, 1890; Silas P. Smith to *id.*, February 4, 1890; Robert White to *id.*, February 4, 1890; Alexander Parks to *id.*, February 5, 1890; D. R. Paige to *id.*, February 5, 1890; C. J. Harrington to *id.*, February 5, 1890; Joseph Gallagher and Son to *id.*, February 5, 1890; L. T. Gray to *id.*, February 5, 1890; B. W. Price to *id.*, February 6, 1890; B. B. Wilson, to *id.*, February 6, 1890; John J. Jacob to *id.*, February 8, 1890, Fleming MSS.

565 Wheeling *Register*, February 5, 1890.

566 *The* (Weekly) *State Journal*, February 6, 1890; Wheeling *Register*, February 5, 1890.

567 *Ibid.*, February 5, 1890.

568 *The* (Fairmont) *Index*, February 14, 1890.

569 The Charleston *Gazette* quoted in *The* (Fairmont) *Index*, February 14, 1890.

570 *The* (Fairmont) *Index*, February 14, 1890.

the Capitol steps various state leaders. Among them were: Judges John W. English and Okey Johnson, state Democratic leader, Thomas S. Riley, Clerk of the Supreme Court Odell S. Long, Fleming's leading attorney St. Clair, and legislators Benjamin H. Oxley, Anthony D. Garden, Malcolm Johnson, and Alex R. Campbell.[571]

Riley called the assemblage to order. After a prayer, offered by the Rev. H. Wallace Torrence, Pastor of the Kanawha Presbyterian Church, Wilson introduced Fleming. The Governor-elect stepped forward[572] and gave a brief inaugural address. He lauded the state and looked forward to its future development, especially industrial, and hoped for pure and honest elections. He pointed out that the election contest was officially recorded, and that its testimony would remain against the perpetrators, who had schemed to corrupt the election, as long as the records of it were preserved. Of corrupt election practices he significantly stated, "The popular tendency to adopt the methods of the Quays and Dudleys for the achievement [*sic*] of party victory, is a menace to free institutions and free government that challenge the thoughtful attention and serious consideration of patriotic citizens of all parties."[573]

He proposed to do his duty as governor and in concluding his address he said, "I am ready to take the oath of office, and, 'with malice toward none and charity to all' enter upon the discharge of my duties." As he turned, Judge English "extended the well worn Bible [*sic*] on which so many solemn oaths . . . [had] been taken." Fleming reverently touched it and after English administered the oath of office, Aretus Brooks Fleming "bowed, and kissed the book . . . ."[574]

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571 *Ibid.*
572 *Ibid.*
573 Fleming's Inaugural Address. (MS), Fleming MSS.
574 *The* (Fairmont) *Index*, February 14, 1890.

Truthfully, the candidate who had been legally elected *by popular votes* on November 6, 1888 will never be known. Considering the *prima facie* election returns and the number of votes accredited to him by the minority report, Goff was elected. Likewise, deliberating upon the majority's computation of votes only Fleming could have been elected. The Democrats did not err in charging that illegal votes were cast, especially by non-residents. The evidence, if reasonably observed, exonerated the Republicans so far as systematic fraud was charged. Rather, the illegal votes seemed to have been cast by individual accord, the Republicans, perhaps, receiving more of them. Partisanship played its diabolical role throughout the contest. Except for giving the Democrats some information on which to base their claims, which they did not officially possess at the 1889 legislature, the work of the Joint Contest Committee was useless in deciding the election. The way to discover who was legally elected was not feasible, that was, to trace the conditions under which every vote was cast.

Removal of the Capital of West Virginia from Charleston to Wheeling-1875

By Marjorie Holmes Derr

The controversy over the removal of the capital of the state from Charleston to Wheeling in 1875 is of significance not only because it reflects the attitude of the different sections of the state toward Governor Jacob, but also because it exemplifies the governor's adherence to constitutional duty as opposed to personal opinion.

Some evidence would have us believe that Governor Jacob "did not have as much backbone as an eel, and was both afraid to veto or sign the (removal) bill, which became a law without his taking any course save the refuge of cowards—neutrality. Thus did he lose friends and forfeit the respect of all parties."[1] However, his stand on the whole question proved itself to be firm and backed up by sound judgment.

Charleston had been the capital of the state since April, 1870, when it was moved there in compliance with a legislative act of February 26, 1869.[2] By an act providing for the removal, Charleston was declared to be the permanent capital. However, it proved not to be such, for by another act of the legislature, passed February 20, 1875,

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[1] *Tri-Weekly Courier* (Charleston). May 22, 1875.

[2] The seat of government had been at Wheeling since the formation of the state (June 20, 1863). Then in 1870, after the ratification of the Fifteenth Amendment (March 30, 1870), an influential element in the Republican party in West Virginia advocated a more liberal "let-up" policy toward the Democrats whom they had so successfully held down since the founding of the state. The same legislature which submitted the Flick Amendment (restoring political disabilities of ex-Confederates) voted to remove the capital from Wheeling to Charleston, to which place the government and its records were transported on the steamboat *Mountain Bay* in March, 1870. (The above information has its source in *"The Story of Reconstruction* by Robert S. Henry.)

to take effect ninety days after its passage, the capital was again to be established at Wheeling, "until otherwise provided by law."[3]

The act stated further that Henry K. List, Michael Reilly, John McLure, George W. Franzheim and Simon Horkheimer, citizens of Wheeling, had agreed to furnish the state, without cost, suitable accommodations in Wheeling for all the state departments, including the state library, should the seat of government be removed temporarily to that city. Because of this convenient arrangement, and based on the opinion of the legislature that the capital should be located at a more accessible and convenient point,[4] the bill was passed.

The act also authorized the Governor "to cause suitable accommodations to be prepared in Wheeling" and "to remove thereto and cause to be properly placed or arranged the books, papers and movable property . . . including the State Library," the afore-mentioned Wheeling citizens "agreeing to indemnify the State against the expenses thereby incurred."[5] It is to be noted that these expenses included removal costs.

The legislative vote on the removal bill was geographically divided. As would be expected, the northern votes were for and the southern votes against the measure. The political divisions were also clearly shown. The northern counties, with the exception of Jefferson, were strongly Republican, while all the southern counties had Democratic majorities.

Two significant points may be mentioned: (1) the divided House vote in Kanawha County, in which the capital was located (one delegate having voted for removal while the other two voted against it), and (2) the divided Senate vote in the 12th district, Berkeley County voting against the bill, while Morgan and Jefferson voted for it.

[3] W. Va. *Acts*, (Feb.) 1875, pp. 5-6.

[4] It would appear that Charleston was more convenient as it was more centrally located, but it was not as accessible because of poor transportation and communication. There were no railroads or navigable rivers running in the Charleston vicinity.

[5] W. Va. *Acts*, (Feb.) 1875, pp. 5-6.

Moreover, in the House, Jefferson's vote had gone against removal, while Morgan and Berkeley favored it.

It may be remembered that the northern part of the state was more densely populated than the southern, and that the Baltimore and Ohio Railroad, the only existing line in West Virginia in 1875, ran directly across the northern section through Jefferson, Morgan, and Berkeley Counties to Barbour County where it branched off, one line running west to Parkersburg on the Ohio line, and the other running north to Wheeling. It is only natural to assume that every county connected by rail with Wheeling would vote in favor of the state capital being moved to that city.

The removal act "excited much feeling in the southern part of the state, especially in the Kanawha Valley. The people of that section felt greatly aggrieved at the action of the legislature; many felt that their rights and interests had not been duly respected, and that the act of removal was dictated by the spirit of unfriendliness on the part of the people of the upper portion of the state towards them."[6]

The act was immediately attacked by that group of people in the vicinity of Charleston, whom the Wheeling editorialists referred to as the "corner-lot politicians,"[7] as being unconstitutional. They based their assumption on: (1) the fact that the governor was directed to move the seat of government, although the funds to do this were not authorized;[8] (2) the provisions of the state constitution of 1872 which stated that the capital should be permanently located at Charleston until otherwise provided by law;[9] (3) the argument that the title of the act did not accurately state the purpose, as required by the constitution, because the act intended permanent removal but the title states it to be temporary.[10] It was claimed that "until otherwise pro-

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[6] Special Message of Governor John J. Jacob, November 10, 1875.
[7] Wheeling *Intelligencer*, May 18, 1875.
[8] W. Va. *Constitution*, Article X, Section 3. "No money should be drawn from the treasury but in pursuance of an appropriation made by law."
[9] *Ibid.*, Article IV, Section 20.
[10] W. Va., *Acts*, 1875, entitled "An act to remove the seat of government temporarily to Wheeling," p. 5.

vided by law" meant until located *permanently*, and therefore prevented the legislature from moving the seat of government "temporarily" as the act contemplated.

In addition to these accusations of unconstitutionality, they insinuated that the legislature had been bought. "The bill was passed, and no sooner had the news gone out than those who had been foremost in the iniquity grew pale of the fear of repudiation from nine-tenths of the state. But the reaction came too late. The foolish legislators returned home, and, to silence the popular clamor, nearly every one of the removalists was constrained to use and explain to his disgusted constituents the anguish of the recreant."[11] The fact that the legislators were "obliged to 'rise and explain' to their angry constituents when they returned home . . . will be [was] fresh news to a large number of people in the first and second districts. What the excuse was which the removalist members made for themselves is not stated. Nor is it stated whether the excuse was satisfactory or otherwise."[12]

The opponents of the bill stated further that "the foolish statesmen had been herded and driven by corrupt politicians and bribery," and that "the bill was unconstitutional, and aside from this the Charlestonians had the verbal assurance of the governor that upon this fatal defect, he would veto and thus kill such *ex parte* legislation."[13]

A Charleston correspondent of the Cincinnati *Commercial* discussed the situation in a letter which was published in Cincinnati, Charleston and Wheeling papers. As a spokesman of the anti-removalist group, he explained the governor's part in the passage of the bill in this manner:[14]

> The night the bill was passed His Excellency was closeted until nearly daybreak with one Andy Wilson, sent here by Wheeling to "use" the Governor. Up to the hour of this dark-lantern interview, Governor Jacob had been an avowed opponent of the bill. Wilson had been one of Jacob's most

[11] *Tri-Weekly Courier* (Charleston), May 22, 1875.
[12] *Intelligencer* (Wheeling), May 19, 1875.
[13] *Tri-Weekly Courier*, May 22, 1875.
[14] *Ibid.*

> faithful henchmen, and when the latter sold his birth right in the Democratic party and deserted to the enemy, he held in his hand his right-bower—Wilson. It was justly feared by the removalists that their unconstitutional bill would have its life stamped out of it by the veto of an honest Executive, and hence Andy Wilson's pilgrimage here to manipulate and corrupt the weak-backed Governor. By holding up to his venal palate, the tempting bait of the next Senatorship, Wilson so improved Jacob's eyesight that he could see nothing but justice and public policy in the bill, which he had only a few hours before so severely condemned.

As a result of the opposition to the removal bill, Judge Ward of the circuit court, on March 30, 1875, issued an order:[15]

> . . . deeming the matters and things set forth in this bill worthy of thorough judicial investigation, an injunction is hereby awarded to the plaintiffs . . . enjoining, and restraining and inhibiting His Excellency John J. Jacob, Governor; Edward A. Bennett, Auditor; John S. Burdett, Treasurer; Benjamin W. Byrne, Superintendent of Schools; Charles Hedrick, Secretary of State; John L. Cole, Librarian; J. Bernard Peyton, Clerk of the House of Delegates, and Keeper of the Rolls; and Joseph S. Miller, Clerk of the Senate in and for the State of West Virginia, both in their individual capacities, their agents, employees, and all other persons whatsoever, aiding, or assisting therein, from removing . . . the books, papers, archives, furniture and other movable property of this State, including the State Library, the records and proceedings of the Legislature and Executive departments . . . to the city of Wheeling.

The process in the cause was issued on April 30, with the indorsement by the clerk that bond and security had been given, as required by the order of the judge and the restraining order was also endorsed. The process was executed May 1, on all the defendants except Joseph S. Miller, on whom it does not appear to have been served.

On May 17, defendants John Cole, John Burdett, Edward A. Bennett, and B. W. Byrne appeared in the circuit court and filed answers to the bill, and the cause was set

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[15] Slack *et al*, *v.* Jacob *et al.* 8 W. Va. 621-622 (1875).

for hearing. They also moved the court for a dissolution of the injunction. The substantial purport of each of the answers was denying the unconstitutionality of the law. Governor Jacob and the other defendants do not appear to have answered or appeared in the cause.[16]

There was great excitement throughout all parts of the state in the days following the injunction. Excerpts from the newspapers of representative sections show, to a great extent, trends of popular sentiment. From Parkersburg and Grafton, in the western and northwestern parts of the state, there is comment on Governor Jacob's unofficial statement on the matter. A letter to Judge Ward was written, as quoted by the *Intelligencer*:[17]

> . . . in moderate, but firm terms, and should satisfy, by its clear and sound judgment that the issuing of the injunction was a very foolish thing on the part of Judge Ward. The Governor says that, by the act of the legislature, which is clearly constitutional, the seat of government passed to Wheeling despite any discretionary power on his part to take it there or prevent its going. Of course he cannot obey the injunction in a matter in which he is powerless.

And again it was said:[18]

> The governor will not regard the injunction. He has indicated his intention to remove the archives to Wheeling. . . . He has been notified that the necessary funds to defray the expenses of removal are deposited, subject to proper order, and having an option in the matter, he will of course, proceed to carry out the will of the people as he is directed to do. Judge Ward, we are informed, has determined to have 'nothing more to do' with the matter.

Another interesting editorial entitled *Going, Going, Nearly Gone . . . Governor Jacob Bound to Go to Wheeling* comes from the Charleston press:[19]

> Governor Jacob has requested the State officers to prepare to remove to the City of Wheeling. He suggests that

[16] *Ibid.*, pp. 622-623.
[17] Wheeling *Intelligencer*, May 3, 1875. Reprint from the *Parkersburg City*.
[18] Wheeling *Intelligencer*, May 3, 1875. Reprint from the *Grafton Sentinel*.
[19] Wheeling *Intelligencer*, May 3, 1875. Reprint from the *Kanawha Chronicle*.

books, records, etc. be packed and ready to go because on and after the 21st of May the seat of government of the state will be at Wheeling by an enactment of the Legislature, and it is desirable that there should be no interruption of the public business.

The Governor assumed in the first place, and has maintained by argument in reply to a remonstrance from the citizens of Charleston, that an act of the Legislature made Wheeling the seat of government, and only an act of the same authority could unmake it. . . . The writ of a Judge cannot change the seat of government . . . . cannot repeal the law. This appears clear enough. Now suppose an injunction is obtained when the time comes, and the writ is served on the Governor on the day. The law goes in force, and the Governor is detained here, that would not change the law; the capitol would be at Wheeling, and it would yet be at Wheeling if not a book or scrap of paper belonging to the State should go up there. The law, and not the Governor, fixed the capital at Wheeling.

Stronger feeling is shown in the Wheeling editorial interprepation.[20]

Governor Jacob has, of course, paid no attention to this bill from the Charleston Vatican. Like Bismarck, he knows what he is about. He had everything in progress for moving on the day named. He himself is already in the eastern part of the state, on a visit to his old home, and will be here, we presume, on the 21st, to start the wheels of government in the restored capitol. Unless the Charlestonians are prepared for the consequences of precipitating a conflict between the state government and the one-horse judiciary down that way, they have acted very foolishly indeed, in the light of their own interests. The people of the state have no sympathy with such a purely selfish and mercenary movement. They demand, and will demand, that the will of the people, as expressed through their representatives, should be respected and acquiesced in until regularly passed upon by the constitutional tribunal of the State, in a case regularly before it instead of being thwarted by an injunction sued out by a ring of corner-lot speculators in the court of a patent-medicine man.

It remains to be seen to what length this Charleston ring will proceed. Governor Jacob is commander-in-chief of the militia of the Commonwealth, and is clothed with the power and duty of executing the law. He can summon the militia of the state to his aid in case an attempt is made to

[20] Wheeling *Intelligencer*, May 10, 1875.

forcibly restrain the executive of the law from removing the Capitol from Charleston. He has not indicated to the public what he will do in case any interference is attempted at Charleston, but we all know that he is a determined man, and not easily dissuaded from his convictions of duty . . . .

The point in the case between the people of West Virginia and a lot of property owners at Charleston is well understood. The result involves the coordinate dignity and authority of the Executive and Legislative departments of the government of this State . . . . If any Magic Relief judge, at the instance of a ring of any kind, can block the execution of a law, or suspend its operation until great public confusion and mischief result, then is the absolute veto power of the State lodged in the hands of anyone of the nine circuit judges whose interests or ignorance may lead him to attempt to restrain the execution of a purely political act of the Legislature . . . .

Governor Jacob, in a message to the adjourned session of the Legislature on November 10, 1875, made the following statement concerning the removal act and Judge Ward's injunction:[21]

Soon after your adjournment, members of the Charleston bar presented to me a protest against the execution of the law, alleging its unconstitutionality. At the time the bill came to me for approval, I examined it, as best I could, to see if it violated any of the provisions of the Constitution. *My private judgment had not been favorable to the policy of the bill*, and if it had been in conflict with the Constitution, I should not have hesitated to return it without my approval. But I found no constitutional objection. In the light afforded me by the gentlemen making the protest, I reexamined the question; but became fully satisfied that their points were not well taken—that the Act was not unconstitutional, and that it was my duty to execute it as required by the Act. At the instance of some private citizens of Charleston, an injunction was granted by Judge Ward . . . for restraining the Governor, Auditor, Treasurer, et cetera . . . from removing . . . the books, papers, archives, furniture and other movable property of this State, . . . from . . . Charleston . . . to . . . Wheeling . . . or in any manner carrying into execution the (Removal) Act . . . until the further order of the Circuit Court of Kanawha County or of a Judge in vacation. This process was served upon me April 30. In a personal communication to Judge

[21] *Special Message of Gov. J. J. Jacob* (Nov. 10, 1875), W. Va. Senate *Journal*, 1875-6.

Smith of the Kanawha Circuit, his court being at the time in session, I informed him that I did not intend to appear or answer in this suit, disclaiming any want of respect for himself or his court, but alleging that he had no jurisdiction in the premises, and that any order made by him would be void. The Auditor, Treasurer, Librarian and Superintendent of Schools answered, and the case was heard by Judge Smith, who decided the act to be constitutional and dissolved the injunction May 18, but claimed that he had jurisdiction in the premises;[22] he however granted a suspending order to permit the plaintiffs to apply for an appeal and supersedeas. This suspending order had the effect of reviving the injunction and it was in force (so far as it could have any effect) May 21, when the law took effect.

Governor Jacob's departure from Charleston the first week in May, just before the Circuit Court meeting, caused no little comment. Charleston editorialists remarked:[23]

We did not hope Governor Jacob wouldn't get out of the county till Judge Smith came around. It is enough to make the stones arise and weep to see Jacob skedalling before Circuit Court meeting. There are symptoms that our courageous executive is preparing to execute his usual maneuvre. Every emergency finds him ready to dodge. We are very much afraid since Jacob left before the Circuit Court meeting, some pressing necessity may interfere with his return until after the injunction business is settled. That magnificent example of intrepid manhood, Governor Jacob, is reported to be meditating an inglorious sneak.

A few days later, the Wheeling newspapers came back with the following comment:[24]

Governor Jacob, whose alleged hegira from Charleston (to escape the injunction) . . . was in the city yesterday on the way back to the corner-lot region. If the great defeated (Walker, the Charleston editor) will only possess his soul in patience for a day or two he will probably see

[22] Slack *et al. v.* Jacob *et al.*, 8 W. Va. 623 (1875). Reference to Circuit Court case. "This court has jurisdiction to ascertain and determine the constitutionality of the law described in the bill, and to enjoin the removal of the archives . . . until the court has passed upon the constitutionality of said law. And the court, although it entertains some doubts as to the constitutionality of the law . . . gives the law the benefit of the doubt . . . there . . . is of opinion that the law . . . is constitutional and valid . . . that the injunction is here-dissolved."

[23] Wheeling *Intelligencer*, May 11, 1875. Reprint from the Charleston *Courier*.

[24] Wheeling *Intelligencer*, May 12, 1875.

> the Governor on the streets of that deserted village once more . . . . The Governor expects to be in at the death in time to be served with whatever is in store for him . . . . He will be found at his post until the last, and will leave the town, we doubt not, with all the serenity and dignity befitting his position. He has been on a visit . . . . and is now ready to meet, face to face, any issue which the corner-lot speculators of Charleston may thrust upon him.

When Governor Jacob left Wheeling May 11, he expressed himself[25] "as anticipating no trouble in the removal of the archives . . . on the 21st. He thought that there was enough good sense and prudence among the leading and influential citizens of Charleston to prevent any attempt at forcible interference." However, this same day on being notified that preparations were going forward under the direction of Governor Jacob for the removal of the archives, Judge Smith issued a warrant for the arrest of the workmen engaged in packing the books and papers at the Capitol. As stated by the *Intelligencer*,[26] "The dignity and authority of the Courts must be respected, and . . . no trifling with the Judicial power will be permitted."

The workmen, in answering the rules for contempt, pleaded that they had been employed by the Governor, and that no disrespect toward the court was intended. They were released and went to work on the boxes, but did no more packing. In regard to this incident the Wheeling editor stated:[27]

> Judge Smith says he intends to arrest everybody that undertakes to do it. Perhaps he will arrest the Governor. He says the injunction must be observed if it takes the Sheriff and a regiment besides to do it. May we not anticipate rather a lively time on the 21st . . . . It strikes me that an enormous wind balloon will be punctured when the wagons begin to convey the effects of the State to the steamer *Emma Graham* on the 20th.

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[25] *Ibid.*, May 13, 1875.
[26] Wheeling *Intelligencer*, May 14, 1875. Reprint from Charleston *Courier*, May 11, 1875.
[27] Wheeling *Intelligencer*, May 18, 1875.

As the day set for the removal approached, the controversy gained momentum indicated by the following article:[28]

> Our special dispatch from the dissolving and expiring capitol of the State shows that the corner-lot men who induced poor old Ward to issue an injunction to save the inflated prices of their real estate, are still at work trying to block the will of the people of the state by getting Judge Smith to interpose some barrier to the removal of the public property. The Governor, like a sensible man, pays no attention whatever to the farcial programme, and . . . . We still believe he will be able to get away without serious difficulty. . . . The people of the State will resent this high-handed attempt to degrade the Legislative and Executive Departments of the government to the level of the good pleasure of a quack medicine judge . . . the archives are not necessary to invest the City with legitimacy as the State Capital, 'the Papacy is where the Pope is' . . . . No empty shell, where the records are detained by force, will be recognized by the people as a Capital.

The Charleston correspondent of the *Intelligencer* also says:[29]

> The conduct of the Governor has mystified everybody. He has been silent and no one knows what he is going to do. . . . Of course the inference is that he means to take it (the capitol) to Wheeling, but then he did not say so, and a great many persons claim that he will not violate the injunction. . . . In other words, they think that when the time for removal comes, he will not allow the property of the state to be removed.
>
> This is not my opinion by any means. I interviewed His Excellency, but he is harder to pump than a dried-up cider tub; but . . . the Governor under the Constitution is amenable only to the Legislature for the course of his official conduct. . . . I cannot see how or why he should pay the least attention to the orders of a circuit judge who has no more control over the Governor than Bismarck has over Grant.
>
> The reason why I think Governor Jacob is going to execute the removal law is because he has not yet asked Judge Smith to dissolve the injunction, although the Governor is in the city, and the court is in session. If he intended to pay any attention to the injunction he would have employed

[28] *Ibid.*
[29] *Ibid.*

Counsel on the part of the State and proceeded to adjust the matter in a legal way.

Meanwhile Judge Smith had modified his order dissolving the injunction as to suspend its operation for one week, thus giving the Charleston men a chance to intercede with Judge Moore of the Supreme Court for an appeal. The Wheeling editor comments:[30]

> The next thing, therefore, we expect to hear of is that Ferguson and the fourteen Charleston lawyers who addressed Governor Jacob so ineffectually upon the subject of his duties are on their way to see the alphabetical Judge at Point Pleasant. Meanwhile we presume the *Emma Graham* will arrive at Charleston wharf, unless blown up by torpedoes on the way, and commence removing the archives of the State unless the corner-lot men with their followers and retainers lay violent hands on them and refuse to let them be moved. In that case, all that is necessary is for the Governor and the other officers . . . to step aboard and leave the town. . . . As for Charleston, 'the salt has lost its savor, and is henceforth fit for nothing.' The Capitol of the State will be where the Legislature said it should be.

The Wheeling editor anticipated the climax in the following manner:[31]

> We think it altogether likely that an order will be issued today for the forcible detention of the archives at Charleston. Unless this order is backed by the actual appearance of the force requisite to detain the property, we presume that Governor Jacob will, as usual, pay no attention to it, but proceed to load the boxes containing the property on the boat. Should the Sheriff of Kanawha County appear on the ground . . . there will be no alternative but to leave the property. . . . This will be an outrage on the public interests, one for which the corner-lot speculators of Charleston will be alone responsible. . . . We presume the corner-lot speculators will be content with the empty victory of detaining the public property—hoping that it may prove bait enough to allure the return of the capitol to that point when the Legislature meets, or perchance, that it may compel the voluntary return of the State officials even before that time. . . . It is altogether unlikely that the Legislature, whose

[30] Wheeling *Intelligencer*, May 20, 1875.
[31] *Ibid.*, May 21, 1875.

> authority has thus been set at defiance, will be in any mood whatever, when it re-assembles to listen to any overtures for compromise from the parties who have ignored the binding force of its enactments.

The editorial prophecy was correct. A Charleston newspaper item says:[32]

> The excitement on the streets was intense on Thursday morning when an attempt was made to remove the archives of the State from the Capitol to the wharfboat. Deputy Sheriff Lentz, with the proper papers, soon let the Governor know that Judge Smith objected, and order was restored.

Another item states:[33]

> Judge Smith wrote a note to His Excellency, J. J. Jacob, requesting him to make his personal appearance before him and if failing to do so, he would issue a rule against him for contempt. Several dray loads of goods were stopped by our efficient Sergeant and arraigned before the Mayor and sent back to the State House there to be unloaded. . . .
>
> James Carlon, the drayman who went to the Capitol to haul the papers, etc., from that point to the wharf-boat, drove up to the gate and stopped, and said he would not drive in the yard until Jacob came out and told him. The Governor being informed of the fact sent Pat Daly to tell him to come in. Carlon could not recognize Pat's authority, and declined to proceed further. The Governor then sent his private secretary to tell him to drive in, all would be right. But Carlon would not recognize the authority of anyone but the Governor himself, and said that he (the Governor) had gone back on the people, and supposed it would not be very hard for him to go back on a Negro.

Governor Jacob related the story to the Legislature as follows:[34]

> On the 20th of May, I commenced the removal of the property to the wharf boat, ready to be put on the steamboat expected the next day from Wheeling. But Judge Smith issued a rule against the party with whom I had made a contract . . . and he was compelled to return it to the State House. Judge Smith informed me by letter

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[32] *Tri-Weekly Courier*, May 22, 1875.
[33] *Ibid.*
[34] *Special Message* of Gov. J. J. Jacob (November 10, 1875).

that application had been made to him for a rule against me, and requested me to appear before his court without it. Of course, I did not comply with his request; whether he would have had the temerity to issue such a rule, I have no means of knowing. It is sufficient to say that he did not do so. In reply to my inquiry whether he intended to issue other and further orders to prevent the removal of the public property . . . he said that 'a sense of duty will compel me to require obedience to the orders of my court until prevented.' And as his rules issued against the workmen were practically as effective to defeat the execution of the law, as if issued against myself, the whole matter was reduced to the question whether force ought to be used to repel the unwarrantable interference of the judiciary with the executive duties of my office. While as a mere marked question of law, there was no doubt about the right, yet I deemed it unwise and impolite to force the issue to this extreme conclusion; the results, I believe, would have been very disastrous; animosities and jealousies would have been enkindled between sections of the State, which would have required years of prudent management to allay. I therefore abandoned, at that time, any further attempt to remove the public property, and placed it in charge of Major John Bolling, one of the clerks in the Auditor's office, who discharged his duty, as he always does, with great fidelity. I lay before you the correspondence between Judge Smith and myself, and also the letter of the contractor, showing why he could not deliver the property at the wharf boat.[35] When the steamboat, sent by the parties who had undertaken to remove the property without cost to the State, came May 21, ready to remove it, it was not shipped for the reasons given above, but the Executive Officers, at once proceeded to Wheeling, and established their offices in the building provided for the purpose, and carried on the public business as usual, but with some inconvenience and trouble.

The Charleston papers were extremely vindictive, and their caustic comments on the whole episode and the Jacob-Smith deadlock on May 20th express the prevailing attitude of the people of that section toward the Governor's action.[36]

'Our brave and fearless Executive materializes rather feebly.' Jacob promised the Wheeling people to bring them

[35] The Smith-Jacob correspondence is bound with the W. Va. Senate *Journal*, 1875-6, and is also reprinted in the *Tri-Weekly Courier*, May 22, 1875.
[36] *Tri-Weekly Courier*, May 22, 1875.

the archives, at any cost of blood and treasure. He fulfilled his pledge with his usual fidelity. His Excellency 'thundered in the index,' . . . but dwindled to the faintest whisper before the close of the first Chapter of his raid upon the Circuit Court. . . .The people of this city have a high respect for the Executive office, but, this has not prevented them from laughing at the ridiculous backdown of the pretentious bully who fills it. . . . A Charleston correspondent of the Wheeling *Intelligencer* is a man of prophetic vision. He says: 'It strikes me that an enormous wind balloon will be punctured when the wagons begin to convey the effects of the State to the steamer *Emma Graham* on the 20th.' Correct inspiration could not have stated it better. That's just what happened. . . .

Of course they (the Wheeling people) did not know that Judge Smith had decided that this was a government of law, and that high office did not, and could not exempt any-one from obedience to the mandates of the court, and that our people were rejoicing . . . over the reign of the law, and at the rebuke that the one man power had received from the courts. . . .

When the conspiracy was formed to pass the bill to remove the capitol, Democrats and Republicans from the country north of the Little Kanawha worked together in great harmony. . . . But when the conspiracy was being fully carried out, the Democrats stayed at home, and nobody came to escort the Governor, and to guard the State archives except two Republicans, John McLure and Judge Cochran.

Why this delicacy on the part of our Democratic brethern? Was it not a common struggle regardless of party? Why not then a joint enjoyment of the victory? Or have the Capitol-moving democrats discovered signs of unpleasantness in the sky of the future?

An elaborate description of the events of the 20th is given in the *Tri-Weekly Courier* (Charleston). We may note several interesting items which help to complete the picture of popular sentiment.[37]

. . . the news had scattered throughout the town that the Executive and the Judiciary had come in conflict. The populace hastened in crowds to the Court House, or gathered in knots upon the street corners and discussed with flashing eyes and excited tones the stirring news of the morning. . . . The uppermost question seemed to be whether the Circuit Court or the Executive would surrender. . . the judge

[37] *Ibid.*

was personally adverse to subjecting the Governor to the serenity of an arrest, and was willing to avoid that extreme step if the doughty Executive would dismount from his high horse and concede the authority of the Court. . . But the Court had taken its position and no power could shake it. An equal firmness on the part of Jacob would precipitate a serious conflict. Had he the fixedness of purpose that distinguishes the courageous from the mulish man? . . . His response to the last missive (of Judge Smith's) realized the severest things that have been said of his lack of manhood and showed him a scolding, blustering, bullying, fizzle.

The response "to the last missive" is as follows:[38]

Executive Department
Charleston, May 20, 1875
Hon. Joseph Smith,

Dear Sir:

Your second communication is just received. No further argument is necessary. I accept your reply as an expression of a determination on your part still further to obstruct the removal of the public property from Charleston to Wheeling. Again protesting in the name of the people of the State against this unwarrantable interference on your part, with the constitutional duties of my office, I shall take no further steps, at present, to remove the public property. As you have thus assumed the custody of the books, papers and records pertaining to my office, as well as those of the other State officers, in violation of a plain Constitutional provision, I shall at once proceed to have an inventory of the same taken. You and all others directly or indirectly concerned in the obstruction of the law will be held responsible for the safe keeping of the books, papers, and records, and other property, now in the building used as a State House.

Very respectfully, your ob't serv't,
John J. Jacob
Governor.

A continuation of the article quoting the preceding letter stated:[39]

The large audience who attended when the Governor's message of surrender was received and read, were thrown into

[38] W. Va. Senate *Journal*, 1875-6. Also, *Tri-Weekly Courier*, May 22, 1875.
[39] *Ibid.*

excitement and there was a disposition to . . . applause. This was promptly checked by Judge Smith, who informed the bystanders that . . . he would punish with severity any disrespect to the communication just received from His Excellency. He did not doubt that the Governor's cause was dictated by a sense of duty and a conscientious purpose to discharge it . . . that . . . their differing views of law and honest wish on the part of each to discharge his responsible duties had involved them in a difficulty, not personal, not official.

The feeling upon the street was one of satisfaction and exultation (that) the betrayer of the community had been compelled to yield an unreserved obedience to the courts he had tried to defy, and there was joy in the land . . . . The coming of the *Graham* . . . was quite a common-place event. The anticipated sensational features had been cut out by the complete 'cave-in' of the Governor. As she came to the landing the boys fired a few rounds from a cannon, in commemoration of the victory of the judicial authority, and after the State officers had taken their places aboard her, a parting salutation was given. Otherwise all was quiet. Even when the Governor, in the presence of assembled hundreds, walked from the hotel to the wharf, unescorted, the stillness was unbroken, neither friend nor enemy raising voice to cheer or hoot him on his way. But the very stillness was ominous of the intensity of popular contempt.

A dispatch . . . announced the granting by Judge Moore of the appeal from Judge Smith's decision dissolving the injunction. This will probably be heard at Charlestown in August . . . until which time and probably for many years thereafter the State Archives will remain in the Capitol at Charleston, the proper, true, and great original permanent seat of the State of W. Va.

The case was heard in Charlestown, and in September, in an unanimous opinion, the Court affirmed the constitutionality of the law, and denied the jurisdiction of the Circuit Court of Kanawha County in the matter. The public property was then taken to Wheeling, arriving September 25.

All claims of unconstitutionality of the act were answered by the Supreme Court of Appeals which stated in its decision: (1) the object of the act was sufficiently explained in the title thereto under the provisions of Ar-

ticle VI, Section 30 of the State Constitution,[40] (2) a judge of the circuit court had not power or authority to enjoin by injunction John J. Jacob as a citizen, or as Governor of the State or other persons acting under his authority in the execution of the Removal Act, until the constitutionality and validity of the act was judicially determined, although, as stated by the court:[41]

> . . . the bill praying the injunction alleged the unconstitutionality of the act, the powers and duties springing from said act and the Constitution being executive and of such nature that enjoining the Governor from executing said act was an invasion by the Judiciary of executive powers and duties devolved upon the Governor as Chief Executive of the State.
>
> . . . (3) the Judiciary cannot inquire into the motives and necessities which may have super-induced the passage of such an act.
>
> . . . (4) the courts have no right to set aside, to arrest or nullify a law passed in relation to a subject within the scope of the legislative authority, on the ground that it conflicts with their notions of natural right, absolute justice or sound morality.

The controversy over the word "temporarily" in the title of the act, was explained by the Court in this way:[42]

> Leaving out the word 'permanent' . . . which was employed in the section of the former constitution, upon this subject, manifestly intended to avoid all possible ground for controversy as to the right and authority of the Legislature to remove the seat of government at any time and to any place.

Governor Jacob informed the legislature in November, 1875, that:[43]

> . . . the parties in Wheeling who undertook to pay all expenses of removal promptly complied with their engagement; it is due to them, and to the city of Wheeling, to say that not only was there no hesitation in fulfilling the contract made with the State, but supposed wants were anticipated

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[40] W. Va. *Constitution*, Article VI, Section 30. "No act hereafter passed shall embrace more than one object, and that shall be expressed in the title."
[41] Slack *et al. v.* Jacob *et al.*, 8 W. Va., 612-13 (1875).
[42] *Ibid.*
[43] *Special Message* of Gov. J. J. Jacob, (Novmber 10, 1875.)

and supplied with great liberality. A committee of the City Council and of citizens having the matter in charge, have relieved me of all trouble or anxiety by the delicacy and fidelity with which they discharged the trust committed to them. A costly, handsome and commodious building is now in course of erection, to be furnished the State, free of cost, for a State House. In the meantime, a building for the Executive offices and Library, and Halls for the Senate and House, have been provided to be used until the completion of the new building.

The dissatisfaction throughout the state continued, as evidenced by an editorial comment in the Philippi *Plaindealer*:[44]

At Wheeling the capitol will be convenient for this section of the State and for the people of Ohio, who may have business at our seat of government, and to this end we suppose the legislature looked when it moved it there, but we think it policy to attend to home first, and let others do the same—it is true conveniences will be perhaps more at Wheeling than Charleston, but our State is new and undeveloped, and so long as the capitol remains at Wheeling, or an unsettled question, the further development of our State will be clogged.

Charleston papers were more vitriolic.[45]

The Cincinnati papers inform us that the cornerstone of the new capitol was recently laid at Wheeling, with a general rejoicing of the people. If the people of Wheeling who claim allegiance to the Democratic party can "see aught' to occasion such rejoicing, when her action has saddened the hearts of thousands of Democrats, whose votes and labor have placed in power the Democratic party of the State, then they have strong hearts indeed.

Governor Jacob summed up the whole matter in his reflections in reference to the location of the seat of government. He said:[46]

It has always seemed to me that a fictitious importance has been given to the question. The only elements that le-

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[44] *Tri-Weekly Courier*, September 23, 1875. Reprint from Philippi *Plaindealer*.
[45] *Ibid.*
[46] Special Message of Gov. J. J. Jacob (Nov. 10, 1875).

> gitimately belong to it, are accessibility and the facilities for the transaction of the public business. A comparatively small number of citizens ever find it necessary to visit the capitol; the great mass of the people are far more concerned in the enactment of wholesome laws, and in their faithful execution, than in the location of the Seat of Government. And I but give expression to the opinion of a very large majority of the people of the State in saying that they have grown weary of the long continued wrangling over this question. . . . To make the question of the location of the State Capitol, the prominent, the controlling element in the management of our public affairs, will certainly not add to our dignity as a State, or enhance our reputation among our sister states.

Nevertheless, great dissatisfaction existed, and on February 21, 1877, the Legislature passed a bill submitting the question of the permanent location of the Capitol to the people, to decide by ballot whether it should be at Clarksburg, Martinsburg, or Charleston; the act declaring that the place receiving the largest number of votes should on and after May 1, 1885, be the permanent capital of the State. Charleston was successful; work was at once begun on the Capitol building at that place, and in 1885, the government made its final removal.[47]

[47] Virgil A. Lewis, *History of West Virginia* (Philadelphia, 1889), p. 470.

Stagecoach Days

By Frank Ball

One of the most colorful periods of American history was the era of the turnpike. Stagecoach drivers were young men with tested driving skill, wearing big hats, leather gloves, and bright clothes. The stagecoaches were always brightly painted, the horses were the best money could buy, and the sleek harness adorned with bright ribbons and tinkling ornaments. Stagecoaches carried passengers and baggage to the extent of twenty pounds a person. More than this was classed as freight and became a part of the cargo of some long freight wagon. Travelers paid their own toll at gates spaced four miles apart. The price was 6¼ cents a gate if you bought a book of tickets before your trip. Separate toll charges were ten cents each.

Giant freight wagons drawn by six sturdy horses, as was the stagecoach, passed frequently. They carried anything from the west that would sell in the east, and anything from the east that would sell on the other side of the mountains.

Plodding drovers driving thousands of cattle, sheep, hogs, or turkeys to eastern cities hampered traffic to a great extent. And stagecoaches must run on schedule. A stage driver would be discharged quicker for failing to keep his schedule than for being intoxicated. For there was strong competition along the turnpike, and trade must be looked after by service.

The caste system was in vogue for the inns along the American turnpike. There were stage stands, wagon stands, and drover stands. The stagecoach drivers and their passengers lodged at the stage stands. They refused to stop elsewhere. And an inn that dallied to stage

trade wouldn't dare jeopardize its social standing by accommodating teamsters or drovers. Not so wide a gap, however, stood between the teamsters and the drovers. While there were wagon stands and drover stands, yet they had been known to mix in case of necessity.

There were many stands to accommodate turnpike travel. A stretch of the old James River and Kanawha turnpike forty miles long in Kanawha County, West Virginia, is recorded as having thirty stands along it.

The James River and Kanawha turnpike was the outgrowth of the old James River and Kanawha Canal. The canal, started from Richmond in 1785, was intended to cross the Alleghenies by way of the James and Greenbrier Rivers to connect with the Kanawha. The canal was stopped at Balcony Falls, Virginia, and the Virginia legislature, in 1824, authorized the building of a 200-mile turnpike across the mountains to the Ohio River. By 1828, this turnpike had reached the Ohio at the mouth of the Big Sandy River.

Two gentlemen by the names of Caldwell and Surbough formed the first stagecoach company along this road. They began operating stages between Lewisburg and Charleston (West) Virginia, in 1827. A year later they extended their lines to the Big Sandy. The fare from Lewisburg to Charleston was $7.00.

Trips were made between the Big Sandy and Lewisburg three times weekly. By traveling seventy to eighty miles daily, this distance could be covered in two days and a half. This speed necessitated changes of horses often.

The fare from the mouth of Big Sandy to Guyandotte was seventy-five cents; to Charleston, $4.50; to Lewisburg, $11.00. At the driver's election, baggage in excess of twenty pounds a passenger could be carried at the rate of $4.00 a hundred pounds for each hundred miles.

Caldwell and Surbough sold the stage line to Porter and Belden in 1829. And these men sought to gain business by advertising daytime driving and rest on Sunday.

Toll gates were bothersome and expensive. People going to mill, or those residing near a toll gate, were exempt from paying toll at that gate. Many abused this privilege. Farmers often allowed traffic to pass through their fields, detouring toll gates, for a less charge than toll gate charges.

There were many colorful personalities along the turnpike. The James River and Kanawha road had its "Jehu Jo" Perkins who lived at Boomer in Fayette County, West Virginia; its Leonard Turner who had his coach and horses captured during the War Between the States; and its slashing Dic Vandever who drove the last stagecoach between Charleston and Lewisburg in 1873. And there were the inn proprietors who took pride in serving their guests, providing the best conveniences available for the period. Then there were shopping places of different nature all along the route. One of the most noted stage stops was the Old Stone Tavern near Clifftop in Fayette County, West Virginia. Generals Lee and Rosecrans used the building as headquarters at different times during the War Between the States. Other notables known to have stopped there are Henry Clay, Andrew Jackson, Thomas H. Benton, Daniel Webster, and John C. Breckenridge.

Today, passengers in much greater numbers ride fast clean trains along this general route, the baggage is neatly stacked in the cars ahead, the rate is much cheaper, and giant freight cars carry a thousand times more freight than the colorful freight wagons of a century ago.

West Virginians in the American Revolution

Assembled and Edited by ROSS B. JOHNSTON

The sources of this material are from the files of the Pension Office at Washington, from various county records, from notes of patriotic societies, principally the Daughters of the American Revolution, Sons of the American Revolution, Sons of the Revolution, and from a large miscellaneous group of published and private sources. Corrections and additions to this list will receive the careful attention of the editor.

TASKER, JAMES
Service—Virginia No. 17658 No. R. 10396

Enlisted in Fairfax County, Virginia, September 18, 1777, and served six years as private under Captain West in his company in the Tenth Virginia Regiment, Continental Establishment, commanded by Colonel Stephens and General Weeden. Took part in the battles of Stony Point, and Blueford's Defeat. He was wounded and captured in the latter engagement.

Married Mary Harper in 1794. In 1818, the soldier was aged 62, his wife, 40, and their children were: Minty, aged 16; Elizabeth, 14; Richard, 12; Delilah, 10; and Fanny, 7. Soldier received pension in Hampshire County, in 1820, and died March 4, 1832. His widow was refused pension. Supporting data was filed by Sampson Henderson, Richard Tasker, Douglas Smith, Patrick McCarty, Reuben Davis, William Janny, William Duling, Jacob Knabenshue, George Tasker, John Ward, and Peter Smith.

TAYLOR, DANIEL (Sergeant)
Service—New Jersey Va. No. 12008 No. S. 6201

Born in New Jersey in 1758 and enlisted, June, 1776, from Sussex County, in company of Captain Winters in the New Jersey Regiment, commanded by Colonel Taylor and Frelinghausen. Was engaged on various marches through Perth Amboy, Brunswick, Elizabeth Town, Wood Bridge and elsewhere.

Pension certificate was issued in Hampshire County, in 1833. Supporting data was filed by Jesse Monroe, Thomas Carskadon, and Thomas Taylor. Soldier was married to Margaret Thatcher, December 27, 1778, and died in Hampshire County, May 3, 1844. Land bounty warrant was issued to his heirs for his war services.

TAYLOR, EDWARD

In Hampshire County, the beautiful old home of Edward Taylor, a soldier in the Revolutionary War, is still standing. It is believed to have been purchased by him in 1806.

TAYLOR, JOHN

Before the Harrison County court, June 15, 1818, John Taylor testified that he enlisted in the regular army of the United States in a company commanded by Captain William Riley of the Fourth Maryland Regiment, and that he served a part of his time under Colonel Samuel Smith, at that time a representative of Congress from Maryland. He enlisted in the year of the battle of Monmouth and fought in that battle and also at Camden where he was captured and held a prisoner for sixteen months. He at length escaped from the prison ship on which he had been confined and continued in the service of his country until the conclusion of the war.

TAYLOR, PAUL

Service—Continental Pennsylvania No. S. 18238

Enlisted at Paxton near Harrisburg, Pennsylvania, in 1775 and served until 1777 as a private under Lieutenant John Robinson and Captain Potts, in the Fifth Pennsylvania Battalion, commanded by Colonel Hartley. He fought at White Plains and at Brandywine. He applied for pension in 1832 and his claim was supported by Jacob Anderson and John Shober. He may have later lived in western Virginia.

TAYLOR, THOMAS

Service—New Jersey and Pennsylvania Va. No. 12587 No. S. 7686

Born in Hunterdon County, New Jersey, in 1760, and there in the fall of 1776 enlisted as a private under Captain Gunandyke in a New Jersey regiment commanded by Colonel Taylor. Fought at Brandywine and White House. Stood guard over an uncle who was a Tory at Trenton, and the uncle tried to get his gun. Was in General Washington's retreat through Jersey. Colonel Taylor, his commander, brought off four field pieces. Mentions Major Bush, who was shot through the hip, and other officers. Was granted pension in Hampshire County, in 1833. Supporting data filed by Isaac Kuykendall, Isaac Pancake, and John Sloan.

TENNANT, RICHARD

Emigrated from Glasgow, Scotland, about 1760 at the age of 16. His father, Richard Tennant, was killed at the Storming of Quebec by General Wolfe in 1763. In 1769, he married Elizabeth Haught at Moorefield where he had settled a short time before. He served as a drummer in Lord Dunmore's War in 1774. He served with Peter Haught, a brother of his wife, in the Revolution, according to Jacob Haught, son of Peter.

During his Revolutionary service he had passed through the Monon-

gahela Valley. Therefore, after the war he came with his family and that of his brother-in-law, Peter Haught, and settled on Jake's Run, Monongalia County. Tennant died in 1820 and is buried in the Tennant graveyard, three miles from Mooresville.

TENNEY, JAMES

Service—Massachusetts Va. No. 4197 No. W. 3888

Born, December 21, 1766, the son of Josiah Tenney; died in Randolph County, Virginia, December 24, 1841. Enlisted at Shelburn, Massachusetts, December, 1780, in the First Massachusetts Regiment, under Lieutenants Shepherd, Green, Kilham, and Colonel Voss, and General Knox. Took part in actions from West Point along the Hudson, and at Philadelphia. His honorable discharge, dated, October 28, 1783, was signed by Major-General Knox.

At Charlemont, Berkshire, now Franklin County, Massachusetts, is the record of his marriage on April 14, 1785, to Thankful Shippee, with Samuel Taylor, clergyman of Buckland, officiating. The soldier received pension in Randolph County, Virginia, 1833. After his death his widow also received a pension in 1847 while living in Lewis County, at the age of 81. There was a large family but the names are not available.

THAYER, ABEL (Captain)

Served as a lieutenant and captain during the Revolution. Marched with a body of Minute Men to Lexington from Williamsburg, Massachusetts, as a lieutenant, April 27, 1775. His name appears as an officer with the rank of captain in Colonel John Fellows Regiment, at Roxbury Camp, May 31, 1777. His place of residence during the Revolution is given as what is now West Virginia. He was born in Braintree, Massachusetts, July 28, 1741; married Dorothy Curtis in 1761; died in Williamsburg, Massachusetts, May 24, 1805.

THOMAS, JOSEPH

Service—Virginia Va. No. 23160 No. W. 6277

Born in Buckingham County, Virginia, August 3, 1759; removed to Kanawha County, Virginia, in 1796-98, where he died, August 1, 1839. He was married to Rebecca Thomas by the Rev. David Patterson, near Providence Meeting House, Buckingham County, Virginia, about 1786. Their children were Lewis, Polly, Washington, Henry, and Mathews.

Enlisted in 1777 under Lieutenant Clouth Shelton, and Captain James Franklin as a private in the Sixth Virginia Regiment, under Colonel Edward Stephens with forces under General Washington. Marched to White Marshes or Chestnut Hill, and took part in engagement there, after which the British occupied Philadelphia, and the American army went into camp at Valley Forge The battle of Monmouth had just ended when he reached that point with American forces under Colonel John Green of Culpeper. Pursued British across North River to White Plains and Stony Point, but was not in detachment which reduced it. Was discharged in November 1778.

Received pension in Kanawha County, Virginia, in 1833. Supporting data submitted by the Rev. David Barbour, Marshall Bowman, Moses Wright, Captain John Thomas (a brother), Samuel and Nancy Hudson, Charles Brown, Thomas Mathew, and John Thomas, (a cousin). His widow likewise received pension.

THOMPSON, ALEXANDER
Service—Virginia Va. No. 16720 No. S. 14691

Born in Augusta County, Virginia, March 29, 1763, where he lived until 1819 at which time he moved to Kanawha County, Virginia. In 1781, he was drafted into the Virginia militia under Captain Cunningham and Colonel Sampson Mathews, and his record gives some interesting information concerning Arnold's invasion of Virginia.

The soldier was marched from Augusta to Fredericksburg, thence to Cahill Point, on the James River between Richmond and Norfolk, then to Smithfield observing the movements of the British fleet; thence to Suffolk, which had been burned by the British. Remained at Camp Carson two months watching the British at Portsmouth. Several skirmishes took place in one of which Captain Cunningham was wounded. Was discharged at Richmond. In 1783, served under Captain John McKitlinch against the Indians about Fort Warnick or Warwick.

Soldier received pension in 1833, which was later suspended. Supporting data given by Daniel Ruffner, James Bell, and Captain Styles.

THOMPSON, JACOB
Service—Virginia Va. No. 5979 No. S. 41240

Enlisted in the First Regiment of Virginia Dragoons under Captain Morrow or Morris, and served as a private. Took part in skirmish near Dorchester, South Carolina. Applied for pension in Harrison County, Virginia, which was issued in 1819. At that time soldier was aged 59, his wife, 59, a daughter, Polly, 26, and a granddaughter, Elizabeth, 10. Soldier died April 11, 1841, and his widow, April 24, 1842.

THOMPSON, STEPHEN

Before the Greenbrier County court, 1781, Elizabeth, the widow of Stephen Thompson, who died in service in the Revolutionary War, together with one child, was certified as entitled to aid.

THORNBURGH, THOMAS (Lieutenant)

Born, September 9, 1752, Shepherdstown, Virginia, the son of Sarah Shepherd and Thomas Thornburgh; died, May 5, 1793. Served as a lieutenant in the Revolutionary War, and after the war settled near Wheeling. Married twice; first wife named Ruth; second wife was Prudence Bentley Collins, daughter of William and Margaret Bentley. His children were Ephraim, Elizabeth, Prudence, Solomon, and Thomas.

THRALLS, RICHARD

Service—Virginia Va. No. 16396 No. S. 6240

Enlisted at Hancock, Maryland, and served as a private two years under Captain Thomas Cabel, under Colonel Gibson, and General Brodhead at Fort Pitt, Fort Lawrence, and Fort McIntosh on the western frontiers. Received pension while living in Monongalia County, in 1833, at the age of 80. Supporting data filed by James Troy, S. Miner, William Brick, Alva Shriver, Neal Lougher, D. V. McHenry, J. Long, and Amos Morris.

TICHINAL, DAVID

Service—Virginia Va. No. 6812 No. S. 7727

Born in Morris Township, New Jersey, October 16, 1764; resided in New Jersey until 1780; resided in Hampshire County, Virginia, for two or three years; then in Harrison County, Virginia, and died in Allegheny County, Maryland, in 1854.

Soldier enlisted in New Jersey in 1780 and served nine months under Captain Richardson and McCarty in the army of General Green on guard duty. His certificate of service in the militia as a substitute for his father, Moses Tichinal, dated March 12, 1782, and signed by Captain Isaac Parsons, is filed at the War Department. Pension was granted in Harrison County, in 1833. Supporting data was filed by J. Copin, R. Moore, H. Gross, and John Smith.

TINGLE, GEORGE

Lived near Shepherdstown at the outbreak of the Revolution. In 1776, enlisted in Captain John Nelson's company of riflemen from Maryland and Virginia, and joined Stephenson's company at Staten Island.

TOWNSEND, JOHN

Enlisted in the regular army in the State of New Jersey in the company of Captain Piatt, First Regiment of New Jersey regulars, in the year 1775, and for the war. He continued in this corps, took part in the battle of Germantown, and of Springfield, where he was wounded and sent to the hospital. He was later captured by the Indians and held a prisoner until the end of the war.

TRADER, ARTHUR

Service—Virginia Va. No. 23390 No. S. 30169

Born in Augusta County, Virginia, in 1747. Enlisted in June, 1776, and served nine days less than two years as a private under Captains Morgan and Neel. Received pension in Harrison County, Virginia, in 1834, but was later stricken from the rolls.

TROTIER, PAUL

Land Bounty Warrant No. 664 was issued in lieu of Warrant 9719 in name of Paul Trotier, April 9, 1856, as a soldier of the Illinois Regiment of Virginia, State line in the Revolution. In Berkeley County,

Virginia, the records show that M. C. Nadenbousch was appointed administrator of the estate of Ann McKnight, who was an heir of Trotier.

TROY, JAMES (Sergeant)
Service—Virginia Va. No. 12806 No. S. 7747

Born, Winchester, Virginia, 1759; died, January 15, 1841, Monongalia County, Virginia. Enlisted in 1774 as a sergeant under Lieutenant Phil Pierce, Lieutenant Sam Swindler, Captain Robert Fenole, Captain Lewis Rogers, Colonel William McCleery at Statler or Stradler's Fort, Monongalia County.

Pension was granted in 1833 but was suspended along with that of Haught, Piles, George Wade and others. The arrears were paid to heirs when his service was accepted in 1859. Supporting data was submitted by Amos Morris, George Wade, Henry Yoho, R. Berkshire, John Keck, Abram Richard, and Joseph Tennant.

TRUBY, JOHN

Before the Randolph County, Virginia, court, November 25, 1811, Valentine Stalnaker, one of the heirs, made oath that he heard John Truby, deceased, say that he had never received any compensation for his services rendered (during the Revolutionary War).

TUCKER, GEORGE
Service—Maryland Va. No. 12586 No. S. 7763

Enlisted in Kent County, Maryland, and served six months as a private under Captain Crane in the Maryland line. Pension was granted the soldier aged 71, while living in Monongalia County, Virginia, in 1833. George Smith filed supporting data. Papers filed in this note the fact that Philip Reed, one of his regimental officers, was severely reprimanded by General Washington for carrying into camp on a pole the head of a deserter.

Book Review

WEST VIRGINIA PLACE NAMES. By *Hamill Kenny.* (Piedmont, West Virginia: The Place Name Press. 1946, Pp. xii, 768. $6.00.)

The study of American place names is one of the most fascinating, rewarding, and illuminating fields of intellectual activity. It is also difficult, puzzling, and chaotic. The fact that the only available knowledge of many specimens of this form of nomenclature is a matter of hypothesis, tradition, or legend adds to both the difficulty and the fascination of the subject. There are few areas of study that have wider ramifications. The student of place names must be basically a linguist. He must, however, be much more. It is necessary that he be, in addition, both a sociologist and a historian. The spade work in this realm of knowledge must be done by the student of local history. We need, though, studies which take in more than this necessarily narrow territory. Although the study of the place names of a great state means the dealing with many problems, it makes a rich and vital contribution to knowledge.

Mr. Kenny's thorough and comprehensive study of *West Virginia Place Names. Their Origin and Meaning, Including the Nomenclature of the Streams and Mountains* bears all of the marks of being the result of long, tireless, and competent work. Since the book was begun in 1936 and completed in 1942, it seems as though war conditions delayed its printing for several years. The author makes the following statement of his purpose in preparing the treatise: "My aims have been accuracy, the enrichment of the main language, the revelation of philological process and resource. Generally the glory of the western Virginia pioneer has been enhanced, frontier life has been illuminated, the practical uses of a reference book have been accomplished, and West Virginia place name speech has been collected, organized, interpreted." This is exactly what the author has done.

The first sixty-four pages are devoted to a valuable introductory essay dealing with matters like the pioneer and his background, sources of place name material, pronunciation, changes, and certain comments on and clarifications of the place name vocabulary. One part of this introductory section is devoted to a discussion of synthetic place names of the type of Erbacon, Elgood, Aso, Champwood, Kenova, Litwar, Mabscott and Oceana. On page 71 begins the dictionary of place names proper. These cover more than six hundred pages and include approximately thirty-five hundred names. In the preface the author tells us that the book "is not in a popular vein." Apparently he means by this that he has confined himself to facts without attention to literary color. In spite of this, however, he has produced one of the most informing and delightful volumes that have been written about the State of West Virginia.

The first impression which the reader gets is that the author has done a prodigious amount of work in preparing this material. Practically all that has been previously written in regard to West Virginia place names has been examined. This naturally includes a thorough study of the available county histories. But much material in this field must be obtained by personal investigations. It is almost appalling to think of the letters which Mr. Kenny must have written. The routine work of investigating place after place alphabetically was done formally by questionnaire. These were sent especially to postmasters and public school principals. Although most of these officials rendered excellent service, the replies of a few of them indicate a limited knowledge of the subject of regional nomenclature.

In most cases Mr. Kenny gives data rather than opinions. If two of his authorities differ, he contents himself with passing along their viewpoints. Once in awhile he expresses an opinion in regard to the origin of a name concerning which there has been more or less divergence of opinion. For example, after giving two pages to a discussion of various explanations of the origin of the name of Wheeling (Ohio) he states his inclination to favor the usual and widely accepted Indian origin of the name and gives three convincing reasons for his position. In regard to the meaning of the name of Buckhannon (Upshur) he casts his vote against the view that the name of the river and town was derived from that of the Indian chief, Buckongahelas or Buck-on-go-hannon, and in favor of the explanation that it comes from that of an utterly unknown person whose surname was Buckhannon or Hannon. Not everybody will follow his reasoning in this regard, the writer of this review still being one of the dissenters.

The author begins the concluding paragraph of his introduction with the arresting statement, "The final word cannot yet be spoken. The pageant of West Virginia place names, filling out the days of the Revolution, swinging on through Civil War and Reconstruction, still marches by." By this he means that the name pattern is continually changing. Smaller post offices are continually being eliminated. Thriving villages of one decade become ghosts in the next. Industrial and social progress causes new centers of population to develop. Therefore other names make their appearance. Eleanor (Preston) is a new post office which was named for Mrs. Franklin D. Roosevelt on account of her interest in the growth and welfare of the housing project near Red House. MacArthur is the post office name of Hollywood (Raleigh) and was obviously given its name for the famous general.

There is another reason that the final word cannot be spoken. Occasionally we secure new information in regard to old geographical divisions. Fifteen years ago we were all reasonably sure that Hamlin (Lincoln) was named for Hannibal Hamlin, vice-president of the United States during Lincoln's first administration. The explanation that the county was named for the president and the county seat for the vice-president was so appropriate that anybody questioning it was looked upon as showing a most uncommendable temerity. But facts will not down. A study of Methodist documents shows that before Hannibal

Hamlin was elected to the vice-presidency there existed on that site a chapel known as Hamlin or Hamline Chapel. An overwhelmingly convincing hypothesis in regard to its designation is that it was named in honor of Leonidas Lent Hamline, bishop of the Methodist Episcopal Church from 1844 to 1852. Although Mr. Kenny presents both explanations in regard to this name, there now seems to be no grounds for a difference of opinion.

The fact that new knowledge of place names is continually being discovered, or that old knowledge is given a wider circulation is evidenced by the fact that certain data in regard to the origin of the name Philippi (Barbour) did not get to the attention of Mr. Kenny, or any other writer on West Virginia place names, until very recently. The generally accepted explanation has been that the town received its name from the first name of Judge Philip Pendleton Barbour of the United States Supreme Court for whom the county was named, but recently another explanation which should be passed along has been brought to my attention.

Judge Ira E. Robinson, a distinguished son of Barbour County and rich in knowledge of its past and present, has presented to me data supporting the theory that Philippi was named for Judge Barbour's daughter Philippa. There is no doubt that the town was once called Philippa. In the book *Samuel Woods and His Family* by Ruth Woods Dayton letters written during the Civil War are headed as coming from Philippa. Judge Robinson reports that when he was a law student in Philippi in 1882 Mr. L. D. Morrall, the first clerk of the court, told him that he had entered the order naming the town for the daughter of Judge Barbour. Slaughter's *History of St. Mark's Paris, Culpeper County, Virginia* records the fact that "Philippa" was the oldest child of Philip Pendleton Barbour. She married a Judge Field, and their son died at the battle of Cedar Creek. Another interesting piece of information, which Judge Robinson secured from the late J. Williamson Smith, is that the bell on the courthouse at Philippi was presented by Philippa Barbour Field. These facts are presented here not only for their intrinsic value but also as evidence that we can constantly add to our knowledge of place names.

Mr. Kenny remarks in the preface that doubtless error has occasionally crept in. If this were not the case in dealing with such a wide range of difficult material, it would be a miracle. We should, however, keep in mind in this connection that even though Mr. Kenny's correspondents have now and then misinformed him, the book as a whole measures up to a high standard of accuracy.

The varying views in regard to the origin of the name of Beverly (Randolph) are given by Mr. Kenny. It might have been well, though, had he settled once and for all the palpable error that the town was named for Beverly Randolph, the mother of Edmund Randolph for whom the county was named. The simple fact is that Beverly was not the name of Edmund Randolph's mother. According to the *Dictionary of American Biography* (Vol. XV, p. 353) the maiden name of this lady was Ariana Jenings (William and Mary Quarterly, April 1900, p. 265),

daughter of Edmund Jenings, at one time King's Attorney for Maryland. Another statement that needs to be corrected is that the *History of Roane County, West Virginia from the Time of its Exploration to A.D. 1927* reports on page 256 that Spencer is named for a "Captain John W. Spencer." Bishop makes no such claim, but on the contrary on page 327 there is a picture labeled as follows:

"Judge Spencer Roane
In whose honor the city and county were named."

Consequently any theory that the city was not named for Judge Spencer Roane should not be ascribed to Bishop.

A few signs of omission are noticed. For example, Warwood, Elm Grove, Fulton, and Bethlehem in Wheeling, or its environs, are not mentioned. Tenerton, a village a short distance from Buckhannon and named for John K. Tener, once governor of Pennsylvania, is not listed. The fault in this case must be ascribed to some of Mr. Kenny's Upshur County correspondents and here a due apology is recorded. The significant fact in regard to the number of names is not the infinitesimally small number of omissions but the rich inclusiveness of the book. Not only are county and town names listed and explained but also those of mountains and streams.

To anybody interested in West Virginia this is a fascinating volume. Not a single student of American place names can afford to ignore it. It is a work of the highest difficulty exceptionally well done. There is no state place name study which surpasses this one in information, interest and general usefulness.

Buckhannon, West Virginia — Lewis H. Chrisman

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ROCKINGHAM COUNTY, VIRGINIA, MARRIAGES, 1778-1816. By *Harry M. Strickler.* (Dayton, Virginia: J. E. Ruebush, 1928, pp. 128.) Gift from Roy Bird Cook.

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